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ANNOUNCEMENT.

Beginning with this issue of the CENTRAL LAW JOURNAL we shall report in digest form all important English and Canadian decisions as they shall appear. We believe our subscribers will appreciate this service, which means to us not an inconsiderable additional expense. We should be fully compensated if you will let your appreciation take the form of a recommendation of the CENTRAL LAW JOURNAL to other members of your bar.

THE FAITH AND CREDIT CLAUSE OF THE CONSTITUTION RESPECTING DECREES AFFECTING REAL PROPERTY IN OTHER STATES.

The case of Fall v. Eastin, 30 Sup. Ct. 3, affirms the ruling of the Supreme Court of Nebraska, that a decree of divorce, granted in the state of Washington, was not required to be recognized under the faith and credit clause of the constitution, in so far as it attempts to convey land situated in the former state. This decision was dissented from *in toto* by Justices Harlan and Brewer, and the concurring opinion of Justice Holmes may also be classed as a dissent from the majority opinion, his special concurrence being based on an independent consideration.

It was conceded that there was complete jurisdiction of the parties upon personal service and appearance; that, by statute in Washington, the equities in all property of the parties could be settled by a decree in divorce; that in accordance with that statutory jurisdiction the Washington court decreed that said land should be conveyed to the wife by the husband, and, he refusing to do so, a deed therefor was executed by a commissioner, appointed by the court for that purpose.

The express ruling of the Federal Supreme Court is, that the Washington decree "gave no such equities as could be recognized in Nebraska as justifying an action to quiet title," in so far as protection given to judgments of sister states by the faith and credit clause of the constitution is concerned. Neither Justice Harlan nor Justice Brewer wrote any opinion, and Justice McKenna, who spoke for the majority, introduces a concept in the words above quoted, which is nowhere discussed in the opinion, that is to say, confining the ruling to the form of action instituted. It is certain, from reading the opinion of Nebraska Supreme Court (75 Neb. 120, 121 Am. St. Rep. 767), that the form of action was not strictly considered, because that court gave plaintiff the right to recover for "taxes and interest and other outlays for the benefit of the property" paid out by her, showing relief is elastic in that state. Justice Holmes thought the "decree was entitled to full faith and credit in Nebraska," so far as establishing the wife's equity is concerned, but he conceived that the Nebraska court was entitled to say whether or not that equity affected the husband's grantee with notice.

It is useless to discuss the proposition whether the Washington decree could directly affect the title to the property involved. It is too plain that it could not. But this is not saying that the *situs* of property may prevent a court of equity from rendering a decree fixing the rights of parties in it and enforcing that decree by coercion *in personam*.

Both the Supreme Court of the United States and that of Nebraska concede this. The latter court expressed itself thus strongly on this feature: "We think there can be no doubt, where a court of chancery has, by its decree, ordered and directed persons properly within its jurisdiction to do or refrain from doing a certain act, it may compel obedience to this decree by appropriate proceedings, and that any action taken by

reason of such compulsion is valid and effectual wherever it may be assailed. In the instant case, if Fall had obeyed the order of the Washington court and made a deed of conveyance to his wife of the Nebraska land, even under the threat of contempt proceedings, or after duress by imprisonment, the title thereby conveyed to Mrs. Fall would have been of equal weight and dignity with that which he himself possessed at the time of the execution of the deed." The Federal Supreme Court appears to take this identical view, as it is said "obedience (in such cases) is compelled by proceedings in the nature of contempt, attachment or sequestration."

This position necessarily implies that, had Fall obeyed the decree by executing a deed, he could not in another state have had his conveyance set aside as obtained by duress, because under these circumstances the decree would be entitled to full faith and credit, the constitutional clause establishing "a rule of evidence rather than of jurisdiction." Hanley v. Donoghue, 116 U. S. 1. But the decree could excuse or justify the duress for one reason only, and that would be that it concerned, legally and rightfully, the title to the land in Nebraska.

We, therefore, have come to this point: If a court of chancery decrees, that one of two parties is entitled to land in another state and coerces the other into executing a deed to the former, that decree must be accorded full faith and credit in the other state under the faith and credit clause of the constitution, while if the coercion is unsuccessful or not attempted, it is not. This looks anomalous, because coercion would seem but an incidental thing and its success the consequence of conscience or cowardice another incidental thing.

Considering that this is so, ought not the general principle, that a decree in one state cannot affect directly the title to property in another to be considered to mean, under the faith and credit clause, that it must be first established as a judgment in the court where the land lies? That being done, it can have process like any other foreign judgment, and that process must conform to the *lex fori*. This was the view held in Burnley v. Stevenson, 24 Ohio St. 474, this case ruling that, because of the faith and credit clause, "the courts of this (Ohio) state cannot decree the performance of that (Kentucky) decree, by compelling the conveyance through its process of attachment, but when pleaded in our courts, as a cause of action, or as a ground of defense, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein, unless it be impeached for fraud."

The opinion in this case cites several cases, but Justice McKenna dismisses them very summarily by saying he will not stop to review them, as the other view accords with the weight of authority. Strange to say, however, this equity idea is not alluded to at all in the cases referred to as being opposed to the Burnley case.

The case of Vaught v. Meador, 99 Va. 569, 86 Am. St. Rep. 908, holds that "such a decree, although no conveyance has been executed, may be pleaded as a cause of action or as a ground of defense, in the courts of the state where the land is situated; and it is entitled, in the court, where so pleaded, to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud." Further on, as illustrating the idea of the failure of such a decree to affect directly the title to land in another state, it is said: "Or if such lands have been converted into money, or money realized therefrom * * * he can be compelled to account, either in law or equity, as the nature of accounts or the character of relief may require."

The Nebraska decision, however, so far as the majority opinion's silence and Justice Holmes' express disagreement with the Nebraska Supreme Court show, is something of a blow to the public-policy idea advanced by Nebraska court for refusing to enforce the decree. That court spoke of a domestic decree being a nullity under Nebraska statute forbidding the apportionment of real estate to the parties, and said: "We know of no rule which compels us to give to a decree of the courts of Washing-

ton a force and effect we would deny to a decree of our own courts upon the same cause of action." Mr. Justice Holmes said: "It does not matter to its constitutional effect what the ground of the decree may be, whether a contract or something else." He cited an opinion by himself, speaking for the majority in Polson v. Stewart, 167 Mass. 211, where it was held, that a covenant made by husband and wife in the state of their domicile to surrender all his marital rights in her lands, situated in another state, if valid where made, is valid in the state where such land is situated, though it would not have been valid had the parties been residents of that state.

But the vaunted declaration of not allowing a decree to affect title to foreign land —thus depriving a state of that exclusive control over its real estate which has always been accorded—seems an idle sort of vaporing, in the face of the acknowledged principle which is thus stated in Phelps v. McDonald, 99 U. S. 298, 308: "When necessary parties are before a court of equity it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal, for it has the power to compel one to do all things necessary, according to the *lex loci rei sitae*, which he could do voluntarily to give full effect to the decree against him." Therefore, all that the state is interested in is, that its manner or mode for the transfer of real estate is complied with, and that is all it pretends to be interested in.

A foreign decree, attempting to dispose of land, is no less a deprivation of a state's exclusive control over its real estate, when it compels a conveyance by a party under duress, than when it omits such compulsion. The real situation is, that a decree in equity, like a judgment at law, needs a new adjudication for extra-territorial enforcement. A court of equity has, in addition to that which a court of law has, a personal control over suitors, but this added power appears to have been treated as a defect, rather than a virtue, in equity jurisdiction.

NOTES OF IMPORTANT DECISIONS.

STATUTES—THE RULE OF EJUSDEM GENERIS.—The federal customs administration act prescribes penalties for its violation by "any owner, importer, consignee, agent or other person" in making entries of imported merchandise. A prosecution was begun against one rendering assistance to an importer who was the person making "the entry," it being claimed by the government that defendant came under the designation of "other person." United States v. Mescall, 30 Sup. Ct. 19.

Defendant claimed that under the rule of ejusdem generis the statute did not cover the offense charged. It was conceded that he did not come under the description "agent," etc.

Justice Brewer, arguing that as the old statute was amended by adding the words "other person," the descriptive terms were exhaustive, approves what was said in National Bank v. Ripley, 161 Mo. 126, 132, that "where the particular words exhaust the class, the general words must be construed as embracing something outside of that class."

The justice further said: "The defendant was a person other than the owner, importer, consignee or agent, by whose act the United States was deprived of a portion of its lawful duties. This act comes within the letter of the statute, as well as within its purpose; and the intent of congress in the legislation is the ultimate matter to be determined."

This decision seems somewhat along the line of United States v. Union Supply Co., commented on in this issue, as showing the disposition of the court to make every sort of rule bend to "intent," and both cases appear to be in opposition, in this way, to Erbaugh v. United States, 173 Fed. 433, also commented on in this issue.

CRIMINAL LAW—ENFORCEMENT OF PENAL SANCTION OF FINE AND IMPRISONMENT AGAINST CORPORATION.—The sixth section of the oleomargarine act requiring "wholesale dealers" in oleomargarine to keep certain books and make certain returns prescribes that "any person who wilfully violates any of the provisions of this section shall, for each such offense, be fined not less than fifty dollars, and not exceeding five hundred dollars, and imprisoned not less than thirty days nor more than six months."

It was contended in United States v. Union Supply Co., a corporation, 30 Sup. Ct. 15, first, that the fact that a form of punishment was prescribed which is, in part impossible of enforcement against a corporation, showed, that such was not "a person" within the

meaning of the section, and, secondly, that if the section was aimed at corporations as well as natural persons, that this impossibility of enforcement, as to an indivisible part of the punishment, made the section nugatory as to corporations.

The first contention was overruled by reasoning showing in what respect this section was amended and how its earlier form, certainly applicable to corporations, presumptively remained unchanged in this respect, this being deemed so evident, that the force of this contention was considered to be overcome.

The second contention presents a broader question, but its treatment, too, is rather special in the opinion of Justice Day speaking for the court.

The opinion thus speaks on this subject: "If the defendant escapes, it does so on the single ground, that, as it cannot suffer both parts of the punishment it need not suffer one. It seems to us that a reasonable interpretation of the words used does not lead to such a result. If we compare sec. 5, the application of one of the penalties rather than of both is made to depend, not on the character of the defendant, but on the discretion of the judge; yet, there, corporations are mentioned in terms. See Hawke v. E. Hulton & Co. (1909) 2 K. B. 93, 98. And if we free our minds from the notion, that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that, if one of them is impossible, it does not mean on that account, to let the defendant escape." To this is cited the Hulton Co. case, supra, and a Kentucky case.

Naturally one might ask why we should "free our minds" as suggested, if we are abandoning a legal principle, which ordinarily obtains? To us this ruling looks at least like putting the door ajar, not to say opening it, for the sort of evil, which generally subjects law to the individual conception of judges uncontrolled by canons of construction. If Congress made a botch of this statute, it ought to go by the board, and it seems to us better to kill a bad statute, than to set up a bad precedent.

CRIMINAL LAW—USING MAILS TO EFFECT A FRAUDULENT SCHEME.—The federal statute prohibits the effecting of any scheme or artifice to defraud "by opening or intending to open any correspondence or communication with any person by means of the postoffice establishment."

This looks like a broad provision sufficient to cover any artifice thus aided, but the ingenuity of a defendant in Colorado appears to have devised such an artifice and to have used the mails for its accomplishment without bringing himself within its terms. Erbaugh v. United States, 173 Fed. 433.

It appears that the indictment charged the defendant with having devised a scheme to defraud, which he "intended to effect by opening correspondence with himself under an assumed and fictitious name by means of the post office establishment."

Judge Sanborn said: "The obvious and common meaning of opening or intending to open correspondence with a person imports distance between him who opens or intends to open it and his intended correspondent, which renders the use of the mails convenient or necessary, and that his correspondent is some other person than himself, for one cannot open correspondence with himself by means of the postoffice establishment by writing and sending letters to himself through the mails, because the communication with himself in such a case must necessarily be opened and intended to be opened when the letter is written and before it is mailed."

That sounds quite metaphysical, and we are not sure we follow the learned judge. Though it is opened and intended to be opened when the letter is written, and before it is mailed," it is intended to be opened again after it has been mailed, and the former opening or intended opening is a something wholly immaterial. The ordinary and obvious sense is certainly, as the court says, but is it the exclusive sense, the purpose being to prevent correspondence—that is letters sent—through the mails from becoming the basis of entering into a scheme to perpetrate a fraud.

The court does not seem entirely satisfied with its conclusion, for it further says: "The offense denounced by section 5480 is severe and a penal statute should be strictly construed." But here is the purpose defined and use of the mails is described, and the description of the means does not demand a severe literalness. We rather believe the indictment should not have spoken of a fictitious person, and the defendant have been compelled to prove that as part of his case. In that case it would be a question whether or not it was competent to show that fact.

But it seems to us the indictment was good, because in the sense of the statute correspondence is letters sent through the mails, and it is immaterial whether the recipient is also the sender or not.

PLEADING ESTOPPEL UNDER THE GENERAL ISSUE—A CRITICISM OF THE CASE OF BALSEWICZ v. CHICAGO, BURLINGTON & QUINCY RAILROAD.

In the comparatively recent case of Balsewicz v. Chicago, Burlington & Quincy Railroad,[1] it appeared that B., eighteen years old, was killed at the residence of his parents at Kewanee in Bureau County, a county remote from Chicago, which city is in the County of Cook. B. had no residence in Cook County, nor did he have any property therein. However, one W. fraudulently and without any right whatever, by some chicanery, got letters of administration from the Probate Court in Chicago, and upon these made a purported settlement with the railroad and gave it a release. The father in the meantime properly received letters where only they could lawfully be issued, namely, in Bureau County, and thereafter sued in that county and recovered a judgment for the death. This judgment was affirmed by the Court of Appeals, and was then carried to the Supreme Court, which was composed of both Cokes and Bacons. There, by a divided court, the judgment was reversed, upon these grounds:

The railroad pleaded the general issue (thus it seems they denied all the facts). Under that issue, it offered a release in evidence; this release was given under the assumed authority of the above named W., who had received the pretended letters of administration from the Probate Court in Chicago. This court had no territorial jurisdiction as the decedent did not live in Cook County, but in Bureau County, through which the railroad ran, and where the death was caused; decedent lived therein with his parents. Beside this, W. had no authority whatever to apply for letters anywhere. All that was known of W. was that it appeared that he called on the railroad and settled the damages, and gave a release and then vanished.

This release was admitted in evidence under the general issue, and was held in the Supreme Court to be decisive of the case. In other words, the release operated as an estoppel of record, although estoppels are odious and must be pleaded, agreeably to the rule that an authority must be pleaded. But in this case the mere letters of administration were held conclusive upon the father, the appellee. This appellee and all in privity with him were free of all fault, free of fraud, free of negligence, free of ignorance.

(1) 240 Ill. 238 (1909).

Estoppel is from the Roman civil law, and is a part of that law along with equity. Now one of the maxims of equity is that "Equity looks at substance and not form;" and so this maxim is expressed and vindicated in the rules of pleading and proving all the estoppels, and especially estoppel of record.

Many cases in Illinois hold that where the judgment or order of a court is relied upon to prove an estoppel or title to property, that then the authority to enter the judgment or order must be pleaded, and if the allegations are denied, they must be proved. From a statement of the facts of the case it is an inevitable inference that the plaintiff was extremely astonished to learn in a trial in Bureau County what the Probate Court in Chicago had done. And all of this iniquity concealed and masked under the "general issue." Nothing could be more at variance with fundamental law—the principles of equity and its cognate principles in res adjudicata or estoppel of record.

There are many decisions in Illinois emphasizing the importance of notice to the adverse side to prevent surprise. The Municipal Court Act for Chicago also emphasizes the requirement of notice for "trial purposes."

It must be conceded that there are liberal intendments to uphold a judgment for some purposes and at certain stages, e. g., when a judgment is sued upon in debt. But it is not conceded that when a judicial proceeding is desired to operate as an estoppel, and close one's mouth from speaking the truth, that such liberal intendment can be invoked. Estoppels are odious when they are not pleaded, and when they are odious, the presumption of regularity cannot apply.

Where a litigant sues on a judgment, he necessarily pleads it, so that his opponent has notice of what he is expected to meet, and ample opportunity to plead and prove the invalidity of the judgment, if he can. There, intendments in favor of the judgment may well be indulged. But the case is very different where the pleadings, as in the Balsewicz case, do not apprise the opposite party, that a judgment is being relied on as having settled any of the issues in the case. The father of the deceased, went into the trial of his case, not knowing of the existence even, of the alleged order of the Chicago Probate Court, much less having had an opportunity to examine the record on which it was based, and thus ascertain whether it was valid. In such a case, it is a manifest call of justice, that if the railroad is allowed to introduce its release at all, it be compelled to introduce the entire record of the Chicago Probate Court, on which the validity of the release rested.

To hold that this release could be sprung on plaintiff without notice, and that it thereupon devolved upon him to prove its invalidity, is the acme of injustice. It is to require the impossible. It is to put the unfortunate litigant in a hopeless trap.

Liberal intendments should not attach to make pleadings an instrument of chicane and covine, instead of servitors of justice. Liberal intendments are for convenience, and to advance the due administration of the laws, but they should never be employed to reverse the maxim: "Fraud vitiates all into which it enters." Ex dolo malo non oritor actio is also from the Roman civil law, and in judicial proceedings it has no exceptions, unless the case under consideration constitutes one.

The Roman civil law—its equity—its maxims—its principles—is the law throughout America. Another of these maxims is De non apparentibus et non existentibus eadem est ratio: What is not judicially presented cannot be judicially considered. This maxim relates to the mandatory, the common law record. The force and effect of this record depend upon the facts expressed and set forth in it. There are no intendments in favor of the establishment of jurisdictional facts; where a court must proceed upon facts, they must be shown to exist before any court can sequester or destroy one's rights.

It is true there is another, and at first blush contradictory maxim from the Roman civil law, and one which the Illinois Court is quite familiar with, judging from cases like Harrod v. Grogan (1906). This maxim is: Omnia praesumuntur rite et solleniter esse acta: All things are presumed to be rightly, regularly and validly done. But this maxim is of secondary importance, and is one of convenience, rather than of protection. It rightly applies to the acts of a court, after jurisdiction has been shown to exist. All subsequent steps in the case are presumed "solleniter et rite esse acta."

The maxim: "Estoppels are odious and are strictly taken," on the other hand, is one of protection, and should not be frittered away on light grounds.

Were the maxims of the Roman civil law better understood, and more frequently applied, there would be fewer such failures of justice as in this Balsewicz case. It ought to be noted, however, that Farmer and Vickers, JJ., dissented from the majority opinion of the Supreme Court.

EDWARD D'ARCY.

St. Louis.

DISCHARGE OF COVENANT AGAINST ASSIGNMENT.—DUMPER'S CASE.

In the absence of an express restriction, either by contract or by statute, the right of a tenant to assign his leasehold estate is incident to every tenancy.[1] But no rule of public policy prohibits the lessor from restricting or absolutely taking away by provisions in the lease the general right of a tenant to assign his term.[2]

A prohibition of assignment is generally effected by a covenant on the part of the tenant not to assign and a further provision for a forfeiture of the lease for breach of the covenant. The provision for a forfeiture is very essential to the full protection of the lessor, as, in case of a mere covenant not to assign without a provision for re-entry or forfeiture, the assignment itself is valid, and the lessee is merely liable for damages for breach of the covenant.[3] And where the lease only prohibits an assignment without the lessor's consent, not providing for a forfeiture or re-entry, it has been held that the assignee may sue the lessor for possession of the premises.[4] In the case of Den v. Post,[5] the court said: "No ejectment can be maintained by the landlord for a mere breach of covenant, not coupled with a proviso for re-entry. His only remedy would be an action for breach of covenant. Neither the lease nor the assignment is avoided by reason of the breach of covenant."[6] In the case of Doe v. Goodwin,[7] the lease contained a provision against assignment, and also a provision for forfeiture on breach of other covenants, and it was held that there

(1) Nave v. Berry, 22 Ala. 382; State v. McCauley, 15 Cal. 429; Barnes v. Trust Co., 169 Ill. 112; King v. Lawson, 98 Mass. 309.

(2) Phila., etc., R. Co. v. Catawissa Ry. Co., 53 Pa. St. 20; Doe v. Carter, 8 T. R. 61; Hargrave v. King, 40 N. Car. 430.

(3) Randal v. Tatum, 98 Cal. 390; Garcia v. Gunn, 119 Cal. 315; Shumway v. Collins, 6 Gray (Miss.), 227; Chautauqua v. Alling, 46 Hun, 582.

(4) Den v. Post, 1 Dutch, 289.

(5) 1 Dutch, 289.

(6) Cited and quoted in 98 Cal. 398.

(7) 4 M. & S. 265.

was no right of re-entry for breach of the provision against assignment, and that it did not create a condition, but a covenant merely. This view was also taken in Crawley v. Price,[8] also in Lymde v. Hough,[9] in which case it was held that by a strict and literal interpretation of the covenant not to let or underlet the demised premises without the written consent of the landlord, under penalty of forfeiture and damages, it did not include an assignment by the lessee of all his right and interest in the lease. The ruling of the court in the case of Field v. Mills[10] was also to the same effect.

An assignment is not void, however, which is made without the consent of the lessor. It is only voidable at the option of the lessor.[11] To constitute a breach of a covenant not to assign, a valid assignment, carrying the legal estate, is necessary.[12]

An Assignment With the Lessor's Consent Discharges the Covenant Against Assignment.—Where the lessee once assigns with the consent or license of the grantor or lessor, the covenant against assignment is determined or discharged, and a subsequent assignment or alienation by the assignee is not a breach of the condition against assignment, and will give no right of re-entry to the lessor, although there is a proviso in the lease for the same.[13]

(8) L. R. 10 Q. B. 302.
(9) 27 Barb. (N. Y.) 415.
(10) 33 N. J. L. 254.
(11) Chipman v. Emeric, 5 Cal. 49; 2 Am. & Eng. Enc. Law, 1048.
(12) Peebles v. Crosthwaite, 13 Times L. Rep. 198. See Gentle v. Faulkner, 68 L. J. Q. B. 848; Richards v. Crawshay, 8 Times L. Rep. 446.
(13) Chipman v. Emeric, 5 Cal. 49; Brummel v. McPherson, 14 Ves. Jr. 173; Leeds v. Compton, 1 Roll's Abr. 472; Jones v. Jones, 12 Ves. Jr. 186; Macher v. Hospital, 1 Ves. & B. 188; Doe v. Pritchard, 5 B. & Ad. 781; Kew v. Trainer, 50 Ill. App. 629; Dougherty v. Matthews, 35 Mo. 520; Murray v. Harway, 56 N. Y. 337; Siefke v. Koch, 31 How. Pr. (N. Y.) 383; Heater v. Eckstein, 50 How. Pr. 445; Chalker v. Same, 1 Conn. 91; McCormack v. Stowell, 138 Mass. 431; Penock v. Lyons, 118 Mass. 92; West v. Robb, 9 Best & Smith, 755; 1 Wood. Land. & Ten. (2nd Ed.), Secs. 276, 320; 1 Taylor, Land. & Ten. (8th Ed.), Sec. 286; Emerson v. Simpson, 43 N. H. 475; Hansen v. Maier, 81 Ill. 321; Voris v. Renshaw, 49 Ill. 425; Bakin v. Williams, 17 Wend. (N. Y.) 448; Doe v. Bliss, 4 Taunt, 735; Sharon Iron Co. v. City, 41 Pa. St. 341; Dickey v. McCollough, 2 W. & S. (Pa. St.) 88.

In the case of Chipman v. Emeric,[14] decided by the Supreme Court of the State of California, the lease contained a clause that the lessee should not assign to any person without obtaining the consent of the grantor or lessor. The lessee made an assignment to Emeric with the consent of the lessor. Afterwards, and before the commencement of the action, Emeric, the said assignee, assigned and delivered possession to one Hibbard. Thereupon the lessor contended that the lease was void for the reason that said assignment to Hibbard was without the consent of the lessor. The court, in passing upon this case, said: "The court below found as a fact that Peralta, the first grantor, had consented to the assignment of the lease to Emeric. This, if it was even necessary, is sufficient to abrogate a covenant against assignment. It is questionable whether, in any case, such a covenant would be enforced so as to produce forfeiture. It is in restraint of alienation and therefore against the policy of the law."

In the case of McCormack v. Stowell,[15] the Supreme Court of Massachusetts said: "The covenant by the lessee that he or others having an estate in the premises will not assign this lease without the written consent of the lessor, does not by its true construction extend so far as to prohibit a re-assignment to the lessee himself without a new and special consent of the lessor." And in the case of Kew v. Trainer,[16] decided in 1893 by the Illinois court, it was said: "Ever since Dumper's case (1 Smith Lead. Cases, 119), although with many shadings, it has been the law, where not cured by statute, that a condition not to alien without license is determined by an alienation under the first license granted, and no subsequent alienation is a breach of the condition, nor does it give a right of entry to the lessor."

Involuntary Assignment.—No breach of a general covenant not to assign is constituted by an involuntary assignment by oper-

(14) 5 Cal. 49.
(15) 138 Mass. 431.
(16) 50 Ill. App. 629.

ation of law, such as the transfer of the term to the personal representatives of the lessee on his death, and the subsequent assignment thereof by them in the administration of the lessee's estate.[17] In the case of Sears v. Hind,[18] it was held that the executor may dispose of the lease for years as an asset, notwithstanding a proviso or covenant that the lessee shall not alien.

In Charles v. Byrd,[19] the Supreme Court of South Carolina had under consideration a lease containing the following provision: "This lease is not transferrable without Mrs. Charles' consent." Mrs. Charles was the lessor and Mr. Byrd the lessee. After entering into possession of the premises under this lease Byrd departed this life, leaving a widow, the respondent. Letters of administration were granted to Mrs. Byrd. Thereafter Mrs. Byrd was notified by the lessor to quit and was sued for possession of the premises. Mrs. Byrd defended on the ground that by operation of law the lease of said premises had vested in her as administratrix of the estate of the lessee, and that she was entitled to hold the same. The court said: "If, then, this agreement must be regarded as a lease for a term of years, creating a leasehold estate in the lessee, it is well settled that, upon the death of the lessee during the term, such estate vested in his executor or administrator, as the case may be, unless there is some provision in the lease stipulating for its termination upon the happening of such an event. * * * A lease for years to A, without naming executors or administrators, would, by operation of law, upon his death vest in his executor or administrator, and no words of limitation could alter the succession. * * * It will be observed that there is no provision in this agreement by which the breach of any of its covenants shall work forfeiture of the lease or determine its duration by limitation or otherwise, and therefore a question might be raised whether a failure on the part of the lessee to comply with any of the stipulations would work a forfeiture or operate as a limitation upon the duration of the lease, or would simply subject the lessee to an action for damages for a breach of covenant. But waiving that question, and assuming that a breach of the provision of the eleventh clause, by an alienation of the lease, would either work a forfeiture of the lease, or determine its duration by way of conditional limitation, the question still remains whether the mere fact that by the death of the lessee, the lease has descended to and become vested in his administratrix by operation of law, is such an alienation as would effect that result. In 2 Williams on Executors, 676, it is said: 'If a lease be made for a term of years upon condition that if the lessee shall assign his term without the assent of the lessor, it shall be lawful for the lessor to re-enter, the term shall nevertheless vest in the executor or administrator of the lessee, without any breach of such condition.' And in a note to Pilpot v. Hoare, 2 Atk. 219, it is said upon the authority of several cases there cited: 'It seems settled that the mere act of a lease vesting in an assignee by operation of law can never be considered as a forfeiture under the proviso or covenant not to assign; for if such act of vesting should be considered a breach, the lease must, in fact, determine by the death of the lessee, which could never be the intention of the parties unless so particularly expressed.'" Continuing, the court said: "If the lessor desires to prevent alienation or transfer of any kind whether voluntary, or involuntary, it is perfectly competent, as it was held in Roe v. Galleries, supra., for him to do so by inserting an express provision to that effect in the lease; but in the absence of any provision, a general covenant that the lease shall not be assigned will not be regard as broken by alienation in invitum, but only by a voluntary transfer."

It has also been held that an assignment through the bankruptcy or insolvency of

(17) Sears v. Hind, 1 Ves. Jr. 295; Roe v. Harrison, 2 T. R. 425; Charles v. Byrd, 29 S. C. 544; Lee v. Lorsch, 37 U. C. Q. B. 262.

(18) 1 Ves. Jr. 295.

(19) 29 S. C. 544.

the lessee,[20] or the sale of the leasehold estate on execution against the lessee,[21] or a sale on foreclosure of a mortgage on the leasehold,[22] is not a breach of a general covenant against assignment. And this is true of a bequest of the term by the lessee.[23]

On the other hand, an assignment by the lessee for the benefit of his creditors is treated as a voluntary assignment, and constitutes a breach of the covenant not to assign,[24] and so is an assignment by one co-lessee of his interest to the other co-lessee.[25] A mortgage of the leasehold, in those jurisdictions in which a mortgage carries the legal estate, has been held to be a breach of the covenant against assignment,[26] but an equitable mortgage by deposit of the lease is not a breach,[27] nor is a legal mortgage a breach in those jurisdictions in which a mortgage is considered merely a security, and not as conveying an estate.[28] Agreements creating simply an equitable charge upon the leasehold are held to constitute no breach.[29]

DUMPER'S CASE.

Dumper's case,[30] decided in the reign of Queen Elizabeth, is the first recorded case upon the question of the abrogation of the clause against assignment by the consent of the lessor to the first assignment. This case was declaratory of the common law in England, and was the law upon the subject in England until the doctrine was changed by statute enacted in the early part of the reign of Queen Victoria. Therefore, since Dumper's case has been followed as an authority in the United States the question might arise whether the decisions of the American courts, founded upon the Dumper case, will be affected by the Act of the English Parliament.[31]

As was stated above, Dumper's case was declaratory of the common law, and common law is a system of Anglo-Saxon jurisprudence derived from custom and usage, and is evidenced by books written by men learned in the law, and by the judicial records of the courts of justice of England.[32] In the case of Forbes v. Scannel,[33] the Supreme Court of the State of California said: "We understand by the 'common law' that general body of law which, as Judge Marshall expresses it, is constituted 'by those general principles and those general usages which are to be found, not in the legislative acts of any particular state, but that generally recognized and long established law which forms the substratum of the laws of every state.' We may look to American as well as English books, and to American as well as to English jurists, to ascertain what this law is, for neither the opinions nor precedents of judges can be said, with strict propriety, to be the law—they are only evidence of law." Chancellor Kent said: "The reports of judicial decisions contain the most certain evidence and the most authoritative and precise application of the rules of common law.[34]

Dumper's case being one of first impression, and not based on any statute, was declaratory of the common law upon the particular question at hand. Dumper's case,

(20) Allen v. Bennett, 1 Fed. Cases No. 214; Bemis v. Wilder, 100 Mass. 446; Doe v. Bevan, 3 M. & S. 353; Doe v. Smith, 5 Taunt. 795; Elplimstone v. Monkland, 11 App. Cases, 332.

(21) Riggs v. Pursell, 66 N. Y. 193; Jackson v. Kipp, 3 Wend. (N. Y.) 230; Medinah v. Curry, 58 Ill. App. 433; Farnum v. Hefner, 79 Cal. 575; Doe v. Carter, 8 T. R. 57.

(22) Riggs v. Pursell, 66 N. Y. 193.

(23) Doe v. Bevan, 3 M. & S. 361; Crusoe v. Bugby, 3 Wils. C. Pl. 237; Fox v. Swann, Style 482.

(24) Medinah, etc., v. Curry, 162 Ill. 441. See Gentle v. Faulkner, 81 L. T. N. S. 294; Magnee v. Rankin, 29 U. C. Q. B. 259.

(25) Varley v. Coppard, L. R. 7 C. P. 505. See Randol v. Scott, 110 Cal. 590.

(26) Becker v. Werner, 98 Pa. St. 555.

(27) Doe v. Hogg, 4 Dow. & R. 226; Doe v. Bevan, 3 M. & S. 353; Doe v. Laming, R. & M. 36; Ex. p. Drake, 1 Mont. D. & De G. 539; Ex. p. Cocks, 2 Deac. 14; McKay v. McNally, 4 L. R. Ir. 438.

(28) Trimm v. Marsh, 54 N. Y. 599; Riggs v. Pursell, 66 N. Y. 193.

(29) Bowser v. Coleby, 5 Jur. 1106.

(30) 1 Smith's Lead. Cases, 119.

(31) This very question arose in an action in which the writer was counsel for one of the parties, but unfortunately the case was amicably adjusted before the decision of the court upon this question was had.

(32) 1 Bl. Com. 64-83; State v. Buchanan, 5 Har. & J. (Md.) 317.

(33) 13 Cal. 285.

(34) 1 Kent. Com. 473.

along with the other great body of English common law, was brought to this country at the time of the immigration; and since it has been held that all decisions, rendered prior to the Revolution, form part of the common law of the states and are binding on the American courts,[35] dumper's case must be treated as part of the common law of this country. The common law, as evidenced by treatises and decisions, was adopted in almost all of the American states at one time or another. The Supreme Court of California[36] said that the common "law constitutes the basis of our jurisprudence, and rights and liabilities must be determined in accordance with its principles, except so far as they are modified by statutes."[37] Speaking of the modification of the common law by statute, no one, it is believed, will have the hardihood to contend that a state court will hold itself bound by a statute of another state, to say nothing of an Act of the Parliament of Great Britain, when passing upon the rights of citizens arising within the jurisdiction of a given state. Acts of Parliament of a general nature, or declaratory of the common law, enacted prior to July 4th, 1776, were declared to be the law of the American States. In some of the states, notably Colorado, Illinois, Indiana, New York, Virginia, Wyoming, Arkansas, Pennsylvania, and Ohio, it is held that all statutes and acts of the English Parliament enacted after the fourth year of James I. are without force and effect in their jurisdictions. But the two dates, viz: July 4th, 1776, and the fourth year of James I., have been adopted by the American States as the time when English statutes shall cease to affect the common law.[38]

Therefore none of the statutory reforms introduced in England since July 4th, 1776, and the fourth year of James I., affecting the common law of England can obtain in this country. Said the Supreme Court of Illinois: "From that period (the adoption of the common law) we must look to American legislation and the reports of American courts for improvements and modifications in the common law."[39] And it has been held that where a decision turns upon the construction of the common law in a sister state, the court will follow its own precedents in expounding the rules of the common law applicable to a given transaction.[40]

O. H. MYRICK.

Los Angeles, Cal.

(35) Roberts v. Weat, 15 Ga. 122; State v. Buchanan, 5 Har. & J. (Md.) 317; Cox v. Morrow, 14 Ark. 603.

(36) Van Maren v. Johnson, 15 Cal. 308, 312.

(37) Lux v. Haggin, 69 Cal. 255, 337.

(38) 6 Am. & Eng. Enc. of Law, 278, 279.

(39) Penny v. Little, 4 Ill. 301.

(40) St. Nicholas Bank v. Bank, 128 N. Y. 26; Falkner v. Hart, 82 N. Y. 413; Ray v. Gas Co., 138 Pa. St. 576.

VENDOR AND PURCHASER—QUIT CLAIM DEED.

DOWNS v. RICH.

Supreme Court of Kansas, Nov. 6, 1909.

A purchaser of real estate by warranty deed whose grantor holds by quit claim deed only will be regarded as a purchaser in good faith notwithstanding such quit claim deed, if his grantor's title as shown by the registry record is apparently valid and clear, and he has no notice of any defect in the title.

GRAVES, J.: W. H. Rich, on April 17, 1906, commenced this action in the district court of Wichita county to quiet his title to the land in controversy against the claims of John S. Downs, who was asserting ownership thereto. The defendant in his answer denied the claim of the plaintiff, and alleged ownership and possession in himself, and prayed that his title be quieted as against the claims of the plaintiff. Plaintiff replied by a general denial. The case was tried to the court without a jury, and the court found in favor of Rich, and awarded him judgment for the land. Downs brings the case here for review.

The district court upon the trial found conclusions of fact and made them a part of the journal entry, as follows: "The court finds from the evidendce that the three quarter sections of land belonged to Leggett and Butler, and on March 4, 1893, they conveyed it by warranty deed to B. M. Anderson, and that such deed was

filed for record in the office of the register of deeds for Wichita county on August 16, 1905; that Anderson conveyed the land by quit claim deed to John Downs, the defendant, on August 2, 1905, which deed was filed for record on August 16, 1905; that after the conveyance to Anderson, and on December 23, 1897, the widow and devisee of Butler, together with Leggett, conveyed the land by juit claim deed to E. A. Robinson, which deed was filed for record on April 27, 1898; that Robinson conveyed the land on March 2, 1898, to Benjamin Warren by warranty deed, which deed was filed for record on May 4, 1898, and Warren conveyed the land to W. H. Rich, the plaintiff, on October 12, 1905, by warranty deed, and that deed was filed for record on October 21, 1905; that, when Leggett and Mrs. Butler conveyed the land to Robinson, the deed was executed with the name of the grantee blank, and they were paid $100 for the conveyance, but the evidence does not show who paid this money, except that it was not Robinson, and that he had nothing at all to do with the matter except to allow his name to be inserted in the deed from Leggett and Butler, and to make the warranty deed to Warren, all of which was done at the request of L. S. Dickey; that Warren, when he purchased the land, had no knowledge, so far as the evidence shows, of the prior unrecorded deed from Leggett and Butler to Anderson; that for several years the land was vacant and unoccupied, but at the time of beginning of this suit, and ever since August 16, 1905, it was in the possession of Wm. Reese as agent of Downs, the defendant."

As conclusions of law it found as follows: "And as conclusions of law the court finds that W. H. Rich, the plaintiff, by his warranty deed from Warren, acquired the same title to the land which Warren had, and that Warren by his warranty deed from Robinson acquired the complete title to the land free and clear from the defect of the title of the previous unrecorded warranty deed from Leggett and Butler to Anderson; that the defendant, John Downs, acquiring the title of Anderson after the deed to Warren had been recorded, is in the same position as Anderson would have been if he had been the defendant and had made no conveyance to Downs."

As supplemental to and explanatory of these conclusions, it appears from the testimony that some person whom the testimony fails to identify wrote to Leggett requesting a quit claim deed to the lands in controversy for the purpose of removing a cloud from the title. Leggett thinks this request came from one of the county officers of Wichita county. He thinks the county treasurer, or register of deeds, but is not certain. Leggett in reply to the request wrote that they had long before conveyed the land, and did not have any right or interest therein, but, if it was necessary to remove a cloud from the title, they would be glad to assist in any way. Subsequently they received quit claim deeds prepared and ready to be acknowledged. They were also requested to obtain certified copies of other papers relating to the title; and $100 was sent to pay them for their trouble. The papers were duly obtained and sent by mail to the person making the request, but who it was Leggett could not state. The name of the grantee in the quit claim deed was left blank. The deeds subsequently appeared in the possession of L. S. Dickey, the register of deeds of Wichita county. How he obtained them does not appear. The only evidence upon the subject indicates that he had no communication with Leggett concerning the transaction. Dickey induced E. A. Robinson to permit his name to be written in the deeds as grantee, and also to execute a warranty deed to Benjamin Warren, Jr. Robinson had no interest in or knowledge of the transaction, and permitted the use of his name merely to accommodate Dickey. All the evidence upon the subject indicates that Dickey was not acting for Warren, and had not had any communication with him upon the subject. Who furnished the $100 sent to Leggett, or who sent it, does not appear. Warren resided at Peoria, Ill., where he was engaged as a dealer in grain. The evidence does not show that he had any actual personal knowledge of the condition of the title when he accepted and paid for the deed. Nor is it shown by whom the deed was delivered to him nor to whom he paid the purchase price.

There is quite an extensive correspondence and some oral evidence shown that J. C. Donnell, who was county treasurer, transacted a large amount of business for Benjamin Warren, Jr., in buying real estate and paying taxes, but nothing to show that the land in controversy was the subject of any of this correspondence or was considered by either of them. From this the plaintiff in error infers that Donnell, acting for Warren, obtained the quit claim deed from Leggett and Butler, and caused Dickey to use Robinson as a "straw man" for the purpose of completing a good title to Warren. In that case Donnell must have known the entire transaction, and, being the agent of Warren, his knowledge would be imputed to Warren. This conclusion would require a very robust interpretation of the testimony, but, if the trial court had so found, this court might have hesitated before disturbing the finding, but, since the trial court found the contrary,

we are unable to say that there is no evidence to justify his conclusion.

It is argued with much force that Warren stands in the same attitude as though he were holding under a quit claim deed, and should be held to the same diligence in searching the records for outstanding conveyances, liens, incumbrance, and equities of all kinds that is required of one who takes a quit claim deed. The trouble, however, with this contention is that Warren did not take a quit claim deed, but received a deed of warranty for which he paid a valuable and adequate consideration. The law relating to quit claim deeds does not therefore apply to him. His rights are not affected by the fact that his grantor held under a quit claim deed only. Meikel v. Borders, 129 Ind. 529, 29 N. E. 29; Winkler v. Miller, 54 Iowa, 476, 6 N. W. 698; Finch v. Trent, 3 Tex. Civ. App. 568, 22 S. W. 132, 24 S. W. 679; Sherwood v. Moelle (C. C.), 36 Fed. 478, 1 L. R. A. 797; United States v. Land Co., 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354; Stanley v. Schawalby, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960; Babcock v. Wells, 25 R. I. 23, 54 Atl. 596, 105 Am. St. Rep. 848. This case has a note in which are collected a large number of cases upon various questions relating to quit claim deeds. At the time Warren received his warranty deed from Robinson, the record showed a quit claim deed from Leggett and Butler to Robinson, which was the only conveyance of any kind disclosed by the record in which they were grantors. At this time Warren does not appear to have had notice that there was any infirmity in his grantor's title. Under such circumstances, it seems that he acted with at least ordinary care and prudence in taking the warranty deed, and ought to be protected against an unrecorded conveyance. The deed of B. M. Anderson has been negligently withheld from record for twelve years. A man who ignores the requirements of the registry laws in this manner is not entitled to any great consideration if he suffers thereby. By negligently withholding a deed from record an invitation is given to those so disposed to mislead and defraud whoever may thereafter wish to deal with the land conveyed. Such a practice should not be encouraged.

Finally, it is urged that Downs placed his deed on record five days before the deed to Rich was recorded; but that fact seems to be immaterial. Downs held under a conveyance from Anderson, who had nothing to convey, his rights having been extinguished by the recorded conveyance to Warren; and, since Warren held a good title, he could convey it to Rich, which he did. We think the conclusions of the trial court are justified under the facts.

The judgment of the district court is affirmed. All the Justices concurring.

NOTE. (1) *Quitclaim Grantees and* (2) *Quitclaim Deeds in Chains of Title.* (1). Inferentially it may be said that the principal case places itself on the side of those courts which hold, that a quitclaim grantee takes title just as it stood in the hands of his grantor, that is to say, subject to every sort of equity and notice existent against him, because the question here was to a prior unrecorded deed, and the only variance in authorities which hold that a quitclaim grantee is not protected is that some of the cases make exception in his favor as to an unrecorded deed.

This distinction is based upon registry acts. Thus in Missouri it was held that a quitclaim deed for a nominal consideration takes precedence over a prior unrecorded deed for a full consideration under a statute providing that no deed shall be valid except as between the parties and such as have actual notice thereof, until the same shall have been deposited with the recorder for record. Strong v. Whybark, 204 Mo. 341, 12 L. R. A. (N. S.) 240, 120 Am. St. Rep. 710. This state had held, generally, that a quitclaim grantee was not to be deemed a bona fide purchaser, but takes with notice of pre-existing equities. Campbell v. Gas Light Co., 84 Mo. 352; Eoff v. Irvine, 108 Mo. 378, 32 Am. St. Rep. 609. But "a purchaser for value by quitclaim deed is as much within the protection of the registry act as one who becomes a purchaser by warranty deed." Munson v. Ensor, 84 Mo. 509, cited approvingly in the Strong case, *supra*. The later case of Hendricks v. Calloway, 211 Mo. 536, 111 S. W. 60, again reviews the distinction between equities not the subject of record under the Registry Act, and unrecorded deeds to which that Act applies. It says the doctrine that a quitclaim grantee may occupy the status of an innocent purchaser for value "has become a settled rule of property in this state. But all the foregoing (Missouri) cases recognize the following element in the rule under consideration, viz: That a quitclaim deed does not bar outstanding equities *not* the subject of record."

In Williams v. Lumber & Shingle Co., 114 La. 448, 38 So. 414, where the contest was between grantee of a levee board and a quitclaim grantee, it was said: "The act under which alone the levee board could have acquired the land here in dispute provides for the registry of the title from the state to the board * * * and the general law upon the subject of registry applies to the conveyance of all lands alienated by the board." The finding was in favor of the quitclaim grantee, as the prior unregistered conveyance relied on by the plaintiff can be accorded of no effect against the vendee. This case will be referred to hereafter under our second head, as also the Strong case *supra*.

The mandatory terms of the Massachusetts recording act were upheld in favor of a quitclaim grantee without actual notice, the deed to him being in the chain of title, in Stark v. Boynton, 167 Mass. 443, 45 N. E. 764.

In Schott v. Dosh, 49 Neb. 187, 59 Am. St. Rep. 531, the opinion after reviewing Nebraska cases summarizes matters as follows: "The fore-

going review we think shows, that while the court has expressed itself to the effect that a quitclaim deed passes no more than the grantor's present interest, this expression has been used to state a general truth, and not as a construction of the recording act, and that so far as concerns the rights of a grantee under a quitclaim deed by virtue of the recording act, the court, while intimating that the tender of a quitclaim deed puts a purchaser on inquiry, has nevertheless always intimated that on proof of *bona fides* he is entitled to protection." There was a quitclaim in this chain.

In Wilhelm v. Wilken, 149 N. Y. 447, 32 L. R. A. 370, 52 Am. St. Rep. 743, the recording act is enforced with the like vigor as in the cases *supra*, and it was invoked to protect subsequent grantees of a quitclaim grantee.

Sanborn, C. J., speaking for a bench in Eighth Circuit Court of Appeals, composed of himself, Caldwell and Thayer, C. JJ., speaks of a long line of decisions by the U. S. Supreme Court holding that the registry statutes did not assist a quitclaim grantee in the particular way shown by the above cases, and then be somewhat complacently comments about "the riper experience and more thoughtful consideration of later years," exploding "the fallacy upon which the earlier decisions of the Supreme Court rested," and leading "that court to adopt the rule which has now become firmly established both upon reason and authority, that the innocent purchaser under a quitclaim deed may acquire the title under the registry statutes as against a prior unrecorded deed from the same grantor notwithstanding the fact that the latter had no title." Boynton v. Haggard, 120 Fed. 819. Among some C. C. A. cases he cites the Moelle case, cited by the principal case, as reported in 148 U. S. 21, and U. S. v. Calif. Land Co., also there cited.

But there are many cases which hold as was said in the Schott and Wilhelm cases that independently of registry acts the question is merely one of *bona fides*. Thus see Graff v. Middleton, 43 Cal. 341; Bradbury v. Davis, 5 Colo. 265 and the cases cited, but hardly applicable, in a question of subsequent grantees of a quitclaim grantee, by the principal case, for the reason that they hold such deed good to the grantee himself.

(2). What we wish to inquire into now is, whether or not where the deed to him affects him with notice, such notice is carried along to subsequent grantees or sub-purchasers. The Strong and Williams cases *supra* do not decide, but there is an inference that had the quitclaim deeds in the chains of title have been subject to pre-existing equities not the subject of registry acts the sub-purchasers would not have been protected. Were the reverse the fact, these cases need not have referred to the distinction we traced as to unrecorded deeds. And the same observation may be advanced as to the Stark case *supra*, especially as the court remarks in its opinion that: "It is not contended that the plaintiff Stark (a sub-purchaser of the quitclaim grantee), had actual notice or knowledge of the defendant's prior unrecorded deed."

The Schott case *supra;* also in one part of the opinion carries the same inference as above, but this is weakened by the court further saying: "The following cases hold, and we think with better reason, that there is no distinction in the form of conveyance * * * and that under them (irrespective of the recording acts) the question is not under what form of conveyance one claims, but whether one is a *bona fide* purchaser, and that, therefore, the holder of a quitclaim deed is entitled to the same protection as one under a deed of bargain and sale or containing covenants of warranty." That view would certainly protect a sub-purchaser without notice.

The New York case of Wilhelm v. Wilken, *supra*, seems quite pointedly subject to the inference we speak of, if this inference is not withdrawn by the following remark: "The practice of transferring title to real estate through quitclaim deeds has not been uncommon in this (New York) state, and in the absence of any facts creating a suspicion as to the transaction of transfer, there is nothing especially significant in the use of such a mode of conveyance." But this would seem to make the doing of a thing not "uncommon" overcome an old rule of law regarding equities not affected by recording acts. This does not appear to be a very satisfactory treatment of a principle. The Meikel case does not announce the principle stated in the principal case, but the recording act intervened there and what was said did not reach the question we have in mind except by way of a general statement.

In Winkler v. Miller, 54 Iowa, 476, there was a prior unrecorded deed, but the case was decided without stress being laid on the registry acts as one of general equity and the quitclaim grantee's title being had in him, and it was held he could convey a good title to a subsequent grantee by warranty deed. The court said: "It is not unreasonable to conclude that a quitclaim deed occurs in the line of many titles where there is no outstanding equity. If the rule contended for by plaintiff should be held, it would tend directly to impair the selling value of all such property." The opinion cites no authority and is otherwise quite unsatisfactory.

In Mason v. Black, 87 Mo. 329, a quitclaim deed in a chain of title recited that: "It is intended to convey by these presents, all title of which I am vested this day, and not to invalidate any sale heretofore made, if any," put a subsequent purchaser on inquiry, and prevented the acquisition of title against an outstanding equity. This decision, however, turns on its facts and the inference from the court's reasoning is that a mere quitclaim in ordinary form would have enabled the grantee to convey a good title, under warranty deed, to a subsequent purchaser.

In Carter v. Wise, 39 Tex. 273, the court refers to Hamman v. Keigwin, ib. 34, as establishing the doctrine that a quitclaim grantee cannot be an innocent purchaser and deduces from that neither can those who hold under or through him be innocent purchasers. The Hamman case rests, for authority, on older cases of U. S. Supreme Court, which Judge Sanborn says "the riper experience" of that court has discarded. But it may be said, that a state court might experience more difficulty in discarding a doctrine than a federal court, because the former, and not the latter, creates rules of property. In Milam County v. Bateman, 54 Tex. 153, the Hamman and Carter cases are approved. In Wallace v. Crow (Tex.), 1 S. W. 372, the general doctrine in the above cases was approved in the following words: "The second purchaser, if without notice, takes

title as against the unrecorded deed, not because any title remained in the vendor after the first conveyance, but simply by force of the registration laws. These laws have, however, no healing virtue that can cure the defects of a quitclaim deed." But in Garrett v. Christopher, 74 Tex. 453, the rule as to quitclaim deed, whether as relates to an immediate or remote grantee preventing one from being an innocent purchaser is still recognized, a distinction is drawn thus: "If the deed purports and is intended to convey only the right, title and interest in the land, as distinguished from the land itself, it comes within the strict sense of a quitclaim deed and will not sustain the defense of innocent purchaser. * * * The use of the word "quitclaim" does not restrict the conveyance if other language employed in the instrument indicates the intention to convey the land itself." The *habendum* clause indicates that the deed is not strictly a quitclaim. As to such a deed in a chain of title an under purchaser is held protected. See also Finch v. Trent, 3 Tex. Civ. App. 568, 24 S. W. 132, following Garrett v. Christopher, *supra.*

A deed having no *habendum* clause has been ruled not to be protected by the registration acts. Fowler v. Will, 19 S. D. 131, 117 Am. St. Rep. 938. Further on this subject see Parker v. Randolph, 5 S. D. 548, 29 L. R. A. 33.

CONCLUSION. It would seem that the tendency of decision is to give quitclaim deeds larger effect than formerly was recognized and courts endeavor to get away from older ruling by distinguishing between deeds which simply convey an interest in, instead of, land itself, only the former being strictly quitclaim. But at all events the great weight of authority is in favor of protecting grantees against unrecorded conveyances. We do not find any very discriminating authority placing a subsequent grantee in a better position than his grantor who took by quitclaim deed. The cases cited by the principal case are those which also protect the quitclaim grantee.

C.

ENGLISH AND CANADIAN DIGEST.

REPORT OF RECENT IMPORTANT ENGLISH AND CANADIAN CASES FOR THE WEEK.

Criminal Law—Taxicab Driver Falsifying Account by Manipulating Register.—The falsification of a taximeter machine on a taxi-cab is the falsification of an "account" within the meaning of s. 1 of the Falsification of Accounts Act, 1875. The driver of a taxi-cab owned by a company who is subject to various regulations issued by the company on pain of "dismissal" who wears the uniform of the company but who takes out his cab each day to ply for hire in the streets of London, paying to the company 75 per cent of his daily receipts, may be a "servant" of the company within the meaning of s. 1, of the Falsification of Accounts Act, 1875, and receive the money of his fares for and on behalf of the company within the meaning of the Larceny Act, 1901.—Rex v. Solomons (Ct. Cr. App., July, 1909).

From the evidence for the prosecution it appeared that on March 31st, April 1st, 2d and 3d, the appellant, when plying for hire a taxi-cab owned by the General Motor Cab Company, drove two music-hall artistes from the Holborn Music Hall to the Crouch End Hippodrome and back with his flag up or only tilted, so that the taximeter was not in operation, as it should have been while he was carrying fares. The appellant charged his passengers 9s. each day, which was less than the proper fare had it been registered by the taximeter.

Alverstone, Ld. Ch. J.: "It has been contended that as the appellant took out this taxi-cab paying nothing for its hire but receiving as remuneration 75 per cent of what he took from his fares, he was not a 'servant' within the meaning of this section. With that contention we cannot agree. He was certainly not in the position of the hirer of a chattel who can take the chattel away and use it how or where he likes and make no return to the owner of the profits which he obtains from the use of the chattel. There have been many cases in which persons have been recognized as not being servants; but the law has been clear ever since the decision in Rex v. Hartley (1807), Russ & R. 139. We must look at the whole substance of the facts proved. In this case we have no doubt that the appellant was in the position of a servant. That being so it is clear that this conviction must stand; for it was not seriously contended that the taximeter sheet and slip were not accounts or an account, and that they had not been falsified. The sheet was filled up from the slip and the slip from the record of the taximeter, and the appellant signed a declaration certifying that the figures were correct. The appellant, therefore, made or concurred in making a false entry in an account within the meaning of this section. We also hold that an offense was committed within the meaning of this section when the taximeter itself was falsified. There are now in use many mechanical contrivances for counting money received, and it would be a serious thing if this court were to hold that the falsification of a mechanical means of recording an account was not the falsification of an 'account' within the meaning of this section."

Deeds—Indefinite Covenant Reserving Right to Construct a Tunnel Not Obnoxious to Rule Against Perpetuities.—On a purchase of land in 1847 a railway company agreed with the vendor that the vendor, his heirs, appointees, and assigns, should have the right at any time to make a tunnel beneath the land sold. Held by court of appeal that this was a personal contract, which was not obnoxious to the rule against perpetuities and could be enforced against the railway company by the assigns of the original vendor.—Southeastern Railway Co. v. Portland Cement Manufacturers, 54 Sol. J. 80.

Mortgage—Foreclosure by First Mortgagee—Right of Second Mortgagee to Sue on Covenant.—A second mortgagee who submits to a foreclosure order absolute in an action for first mortgage does not thereby disentitle himself to sue on his covenant for payment and to recover judgment for the mortgage debt.—Worthington & Co. v. Abbott (Ch. D., Nov., 1909).

Eve, J.: "It has been strenuously argued that a puisne incumbrancer who voluntarily submits to an order absolute precludes himself from suing on the covenant, and in support of that contention a number of cases have been cited which certainly determine this; that if the mortgagee does something which he is unauthorized to do, by express terms of the contract or by implication, to the detriment of the mortgagor,

he cannot sue on the covenant if he is not in a position to restore the property after the debt is discharged. Does an act of this sort fall within the principle established by those cases? The position of the puisne incumbrancer when the summons was served upon him was this: That he might take one of three courses—he might enter no appearance; he might appear and insist on his rights; or, thirdly, he might, as was done here, say, 'I am satisfied that the security is insufficient and as to the bona fides of the accounts, and I waive my right to insist upon the accounts being taken and to have the opportunity of doing that which I never intend to do—namely, to redeem.' Now, I have not heard it contended that if he had adopted either of the first two courses he would have prejudiced himself with regard to the covenant. In either case he would still have retained his right to sue. If he adopted the second course, what would have been the result? In the end, his only right would have been to add the costs he had incurred to his security. If he elects not to incur the expense or not to impose on the plaintiff the expense of taking accounts, and elects to say at once that which he knows perfectly well he is going to say at the end of six months—namely, 'I do not intend to redeem'—that cannot put him in a worse position as regards the mortgagor, and I cannot see upon what principle it ought to do so. It was open to the mortgagor to insist on accounts being taken, and on having proper time to redeem. The only effect of the mortgagee's conduct was that they dropped one link in the process of redemption, and I cannot see how that was to the detriment of the mortgagor."

Powers—Release Inter Vivos of Testamentary Power of Appointment.—The donee of a testamentary power of appointment over settled funds among her children and issue agreed with two of her sons that she would not exercise the power so as to reduce the share of either to less than £7,000, and that the sum should vest in possession upon her decease, and with one of these sons that his share should be at least £7,000, and she agreed with a third son that she would so far release her power and so far contract not to exercise it that his share should be at least £7,000. By her will she appointed and settled the trust funds so that none of the three sons would be entitled in possession to his share. Held, (applying the principle in Davis v Huguenin, 1 H. & M. 730, but for the reason only that the principle had been adopted by long-settled practice), that the three sons were entitled in possession to £7,000 each, less advances respectively made to them out of and in respect of such sums.—Molineux v. Evered (Ch. D., Nov., 1909).

Neville, J.: "How far the donee of a testamentary power of appointment among a class can by a non-testamentary instrument affect the distribution of a fund has been the subject of decisions not easy to follow. It has been decided that such a power may be released. That a covenant to appoint a share to one of the class cannot be specifically performed does not affect the fund. An appointment, however, is not bad because it is in pursuance of such a covenant. It has been said that such a covenant is altogether void. In re Parkin (1892), 3 Ch. 510, it was held that damages can be recovered for breach of such a covenant. In re Bradshaw (1902), 1 Ch. 436, it was held that they cannot. Inasmuch as the power over the whole fund can be released, I think it can also be released over part of the fund. If it can be released by express words I think it may be released by implication. Where, however, the covenant is that the share of the covenantee shall not be less than a fixed sum, the obligation may be satisfied either by appointing the same by will or by leaving unappointed sufficient to provide, on division, for the sum mentioned. In such a case I fail to see how any implication of release can arise. To hold that in a covenant which can be fulfilled by release of the power or otherwise there can be an implication of release appears to me inconsistent with the very nature of a legal implication, which is confined to cases of necessity. If I were free to follow my own opinion I should be inclined to hold that a covenant not to exercise testamentary power so as to reduce the covenantee's share below a fixed sum would not affect the fund at all, any remedy the covenantee might have for breach of the covenant being against the estate of the covenanter. In Davies v. Huguenin, 1 H. & M. 730, it was held that there was a release pro tanto of a power in the following circumstances. One John Davies had under his marriage settlement testamentary power of appointment over settled estates, and it was provided that if he did not exercise his power of appointment the trustees, in whom a term of 500 years was vested for that purpose, were to raise the sum of £6,000, to be divided equally among his younger children. Upon the marriage of one daughter he covenanted that he would not appoint or do any act to diminish the share to which she might become entitled in the pecuniary division or portion secured to the younger children under the settlement. Such share in the event proved to be £1,500. He did appoint £1,000 to this daughter. It was held that the covenant amounted to a release of the power pro tanto, and the sum of £500 was directed to be raised out of the estate to Harriet, in addition to the £1,000. Now what is meant here by 'pro tanto.' John Davies had no power to appoint the £6,000 among his children, but if he did not execute his testamentary power over the estates the daughter took an aliquot share in the £6,000. The only release which could have secured the share in the £6,000 was of the whole power, for if John Davies exercised the power in any way the £6,000 was not to be raised. This so-called release pro tanto, it appears to me, was not in the true sense a release, but a fetter on the power, so that, if exercised at all, it must include an appointment of £1,500 to the daughter. Had there been a release of the whole power, not only would the £6,000 have had to be raised, but the daughter would have been a tenant in common in tail of the estates, subject to the term for five hundred years. In fact, the judgment affects no interests arising from the exercise of the power except to the extent necessary to provide the £1,500 secured to the daughter under the covenant. The decision is a peculiar one, but upon an attentive perusal of the case it is plain, and it is not the first time the courts have gone far in order to facilitate the disposal of property. The facts in Davies v. Huguenin are a little complicated, and it might have been suggested that the true extent of the decision has escaped notice, but such a suggestion is precluded by the lucid judgment of Kindersley, V. C., in Coffin v. Cooper, 1865, 2 Dr. & Sm. 365, where he says: 'But not only has it been decided that an appointment made in pursuance of such a covenant'—that is a covenant that the share shall not be less than the stated amount—'is valid,

but it has been held that such a covenant so entirely precludes any testamentary appointment inconsistent with it that the covenantee may compel the other appointees to make it good out of the shares which the donee of the power has appointed to them by will': Davies v. Huguenin, 1 H. & M. 730. I do not presume to say that that is a wrong decision, indeed it seems to me that it is the legitimate result of the first innovation. But its effect is literally this, that the donee of a power to appoint among children by will only can by deed fix the shares which the children shall take; in other words, he may convert a power to appoint by will only into a power to appoint by deed. Davies v. Huguenin was decided in 1862, and at that date Page-Wood, V. C., thought the point almost unarguable. The case has been cited as an authority in the text books, and innumerable transactions must have taken place on the face of it, including, as I think, those in the case before me."

Principal and Agent—Custom of Stock Exchange as to Secret Profit.—The word "net" in a continuation note is not a sufficient disclosure to a principal not acquainted with the Stock Exchange custom, of the fact that the sum so qualified includes a charge by the broker for his services in respect of the carry-over.—Stubbs v. Slater & Bond.

Neville, J., in his judgment said: I do not think that there was any special agreement concerning the broker's remuneration; in my opinion the evidence does not amount to such a bargain. With regard to the entry "8½d. net," it is clear that it represents continuation money—that is, it purports to have been paid to the jobber for his services in effecting the carrying-over. The jobber in most cases charges a percentage, but sometimes so many pence per share. According to the custom on the Stock Exchange, a given number of pence followed by the word net includes a sum paid to the broker for his services in the carrying over. When this is understood it cannot, of course, be objected to. Some members of the public who are not on the Stock Exchange no doubt are aware of the custom, but a large number are not. I am satisfied that the plaintiff did not know that the entry included a broker's charge. It is, on the face of it, a representation of a sum paid to the jobber, whereas, in fact, an arbitrary amount is added to the continuation money proper, and "net" is added to show that this has been done. To one not acquainted with the custom net conveys nothing of the kind. The charge is, therefore, not one which can be properly made by a broker against his client. It is said that in any event the plaintiff was put upon inquiry, but that his principal was put on inquiry is no defense to an agent; Dunne v. English, L. R. 18 Eq. 524. The rule of the court is rigid that an agent is not entitled to make a secret charge any more than he is entitled to make a secret profit. In this account the broker's charge is concealed in the lump sum. In my opinion, the rule is without regard to whether the concealed charge is reasonable or not. It is said that the actual charge was less than that which might reasonably have been made. That is immaterial. I think that the rule laid down in Solomons v. Pender, 3 H. & C. 639, applies, and that the exception to that rule illustrated by the case of Hippisley v. Knee Brothers (1905), 1 K. B. 1, does not, because the concealed remuneration in the present case is in respect of the precise matter in which the agent was instructed to act, and not in respect of some collateral transaction. In this case the accounts were not rendered in this form with any dishonest purpose, but that is immaterial. The system is a dishonest system.

Railroads—Whether "Sandstone" is a "Mineral" in an Act Excepting Minerals in Conveyance to Railroads.—A statute in England excepted "minerals" from grants to railroads. Held that this exception, from the very nature of the grant, could not include such general substances as sandstone, which constitute such a material part of the crust of the earth.—North British Railway Co. v. Budhill Coal and Sandstone Co., 54 Sol. J. 79.

Such a construction, Lord Loreburn said, would be virtually to nullify all grants to railroads underlaid with any valuable stone. "In many parts of England and Scotland," said Lord Loreburn, "sandstone formed, as here, the substratum of the soil, with, no doubt, other kinds of rock intermixed. If it be a mineral, then what the railway company bought was not a section of the crust of the earth subject to a reservation of minerals, but a few feet of turf and mould, with a right to lay rails upon it, and liable to be destroyed altogether unless the company chose on notice to buy the ordinary rock lying beneath it."

ENGLISH NOTES.

In the Court of Session, Edinburgh, on Saturday, says the London Times, the First Division ordered the expulsion of Frank Montgomery Henderson Young, Thomas Mitchell, and Robert Scott Chalmers from the Society of Solicitors in the Supreme Courts of Scotland, and the removal of their names from the roll of law agents. It was proved that Young had acted as law agent and factor in Scotland on the trust estate of the late Mr. Forbes, of Dunottar, managed by English solicitors, and had embezzled from the trusts £16,000, which had been used in speculation. Mitchell had embezzled nearly the whole of the trust estate of the late Mr. John Lang, Largs, which amounted to £29,900, and Chalmers, during the period he was acting as secretary of the Scottish Oil and Guano Company, sold shares in his own person which were registered in the name of somebody else. His defalcations amounted to over £1,000.

On Wednesday, in the House of Lords, on an application by counsel for the respondents in an appeal to postpone the hearing on the ground that his brief was not delivered till about 6 o'clock the previous evening, the Lord Chancellor said, according to the London Times: "Here we are with a very heavy list of appeals, and we have other duties to discharge. We cannot allow the business of the House to be trifled with. If solicitors do not instruct counsel in proper time for the counsel to be ready to argue a case which in any event is only two or three out of the list, they must take the consequences, and be answerable to their clients in the matter. It is quite impos-

sible to allow the solicitor in a case to run things so fine as to leave the House without proper business to do. Their lordships proceeded with the hearing of the next case on the list, without releasing the parties in the first case.

Nearly one hundred and fifty lawyers, including, of course, a good many nominal members of the bar, sat, says a writer in the London Globe, in the late Parliament. To judge from the lengthening list of legal candidates, the number of barristers and solicitors in the next Parliament will certainly not be smaller. Though it is evident that the constituencies have no objection to being represented by lawyers, some ill-conditioned persons are already complaining that members of the legal profession are too numerous in the Parliamentary arena. This prejudice against political lawyers is no new thing. An ordinance passed in 1372 provided that "no man of the law, pursuing business in the King's courts . . . . shall be returned or accepted knight of the shire," and that—this was, perhaps, the unkindest cut of all—"no such man of law . . . then returned to Parliament shall have wages." Everybody knows that it was the unhappy fate of the Parliament from which lawyers were excluded to become known as the "lack-learning Parliament."

A letter which recently appeared in the London Times contained the statement that within the last few months several millions had been remitted from Great Britain for the purchase of Japanese securities, and that the bonds received in exchange for the money would remain in safe custody in Japan. This letter has been followed by another in one of the financial periodicals in which it is affirmed that the real reason why these bonds are being sent by their owners to Japan is to enable the latter to evade the tax collectors in England by making a false declaration of their real income, and that they contend that if the coupons are re-invested in Japan as they fall due, instead of being remitted to England, they cannot be regarded as income subject to taxation. The writer goes on to suggest that an Act should be passed making it a criminal offense for any person resident in Great Britain to wilfully omit to disclose the income which he derives from securities deposited abroad. "It is unnecessary," says the Solicitor's Journal (London), "to say that we have not the slightest sympathy with those who fraudulently conceal the amount of the income which they receive in this country, and thereby increase the burden upon those who are more scrupulous in their dealings with the Government. But our judges have always recognized the legal and the moral right of every man to dispose of his property, if he can, in a way which does not expose it to be taxed under the existing system of taxation. The question, as it appears to us, is whether the income from these Japanese investments is ultimately received by the investor in the United Kingdom? So long as the money representing this income remains abroad, we have great difficulty in seeing that there has been a receipt by the investor within the meaning of the Income Tax Acts."

HUMOR OF THE LAW.

In a recent divorce case in Adams County, Ohio, the wife charged the husband with many and divers acts of extreme cruelty.

The husband filed a cross-petition charging the wife with a systematic course of abuse and among others the following allegations appear:

"That she persistently accused defendant of committing adultery and fornication with various women and of being the father of numerous bastard children, and circulated this report generally amongst the neighbors; that to have been guilty as charged by plaintiff, he would have had to devote his entire time to licentiousness."

"Plaintiff called defendant a liar so often that an attempt to remember all the instances produces dizziness."

"That at divers times when he was working on his own farm and on adjoining farms, plaintiff would play the sleuth, and shadow defendant's movements, dodging from tree to tree and sneaking through unfrequented places much after the order of Sherlock Holmes."

That was a pretty good way of squelching a legal opinion, as illustrated in the case of Gifford Pinchot, the United States Forester, at the recent Seventeenth National Irrigation Congress at Spokane.

Ex-Judge Campbell of the Department of Justice, sitting beside Mr. Pinchot at a press banquet, made a long harangue upon the illegality of the Forestry Service, and then a personal attack upon Pinchot. When he was through, Mr. Pinchot, smiling as usual, told a single story which effectually closed the episode. It reminded him, he said—the wanderings of the legal mind reminded him—of the story of the Irishman who fell from a high building on which he was working. As he lay on his back with his eyes shut, his palms open upward, the doctor came and looked at him.

"No good to do anything. He's dead," said the doctor.

Just then Pat rose up from his swoon and started up the ladder again. The foreman caught him by the arm.

"Here, here, Pat," said the foreman. "Lie down again, now, that's a good fellow. The doctor knows best, Pat."

All lawyers know the "confidential witness." who, ignoring the jury. insists upon telling the judge his testimony. One of this class had never been inside of a courthouse until he was put on the witness stand.

As soon as the questioning began, he turned his back to the jury, and told his story to the judge, in a confidential sort of way, as though they were chums.

"Address yourself to the jury, said the judge, blandly.

The man paused, but not understanding his honor's direction. went on with his testimony.

"Speak to the jury, sir," again directed the judge; "the men sitting behind you on the raised benches."

Turning around, the witness, bowing awkwardly, said, "Good morning, gentlemen!"—Ohio Law Bulletin.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

1. **Accident Insurance**—Waiver.—In an action on an accident policy, a tender of a part of the policy, in accordance with one of the defenses in the case, held not a waiver of the right to insist on another defense going to the validity of the policy.—Kelly v. United States Health & Accident Ins. Co., S. C., 65 S. E. 949.

2. **Accord and Satisfaction**—"Paid in Full."—The cashing by a creditor of a check containing the words "paid in full," sent by the debtor, is not an accord and satisfaction, unless there is a genuine dispute between the parties as to the amount due.—Caravia v. Levy, 119 N. Y. Supp. 160.

3. **Adverse Possession**—Intent.—An essential element of adverse possession is the intention to claim title, and, where there is no such intention, there can be no pretense of an adverse possession.—Lathrop v. Levarn, Vt., 74 Atl. 331.

4. **Animals**—Dangerous Animal.—It is not ordinarily negligence to permit a youth 15 years old to lead a horse, unless the horse has vicious or dangerous tendencies, of which the person charged with the negligence should have been aware.—Raible v. Hygienic Ice & Refrigerating Co., 119 N. Y. Supp. 138.

5.——Recording Brands.—A brand and earmark recorded, as provided by B. & C. Comp. §§ 4201, 4204, are prima facie evidence of the ownership of the animal on which found.—State v. Brinkley, Ore., 104 Pac. 893.

6.——Stock Law Election.—Under Sayles' Ann. Civ. St. 1897, art. 4980, a stock-law election held invalid because the subdivision in which the election was to be held was not described by metes and bounds.—Ex parte Gulledge, Tex., 122 S. W. 21.

7. **Appeal and Error**—Abstract of Record.—Where appellees do not enter an appearance or question the sufficiency of appellants" abstract, it will be acted on as a statement of all the facts in the record.—Atwood v. Interstate Amusement Co., Iowa, 123 N. W. 63.

8.——Intervention.—Where, after a case has been taken to the supreme court on a writ of error, an intervention is permitted, the intervener may be allowed to withdraw his petition on application of his counsel at the oral argument.—Uzzell v. Lunney, Colo., 104 Pac. 945.

9. **Arrest**—Privilege on Extradition.—A person, arrested in another state and returned to Michigan upon requisition for a criminal charge, held privileged from arrest in a civil suit.—Weale v. Clinton Circuit Judge, Mich., 123 N. W. 31.

10. **Assault and Battery**—Resisting a Trespass.—Mere trespass upon land, even after the trespasser has been warned to depart and has refused, held not to justify the owner in the use of a deadly weapon.—Dickinson v. State, Okla., 104 Pac. 923.

11. **Attachment**—Interpleader by Seller.—The seller, after giving notice of the exercise of his right of stoppage in transitu, may interplead in attachment proceedings by a creditor of the buyer.—Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co., Mo., 122 S. W. 10.

12.——Right to Seize Goods in Transitu.—Where, in claim of third person to property attached, the court finds that claimant had acquired title by bill of sale from the consignee, such finding does not sustain judgment on the ground of the right of claimant, as vendor, to seize the goods while in transit.—Kelley-Steinmetz Liquor Co. v. Haugen, Minn., 123 N. W. 61.

13. **Bankruptcy**—Burden to Show Release of Debt.—Burden is on judgment creditors, filing claims against decedent's estate, to show they were not released by his discharge in bankruptcy.—In re Peterson's Estate, 118 N. Y. Supp. 1077.

14.——Trustee.—A trustee in bankruptcy has a legal status to attack a judgment illegally entered against the bankrupt.—Garrison v. Seckendorff, N. J., 74 Atl. 311.

15. **Bills and Notes**—Bona Fides.—That the holder of a note which was in fact given for insurance premiums for a less sum than the full premium, in violation of statute, knew that his transferror was an insurance agent and that the note was given in whole or in part for premiums, did not make him a holder in bad faith.—Gray v. Boyle, Wash., 104 Pac. 828.

16.——Consideration.—In an action on notes, want of consideration when pleaded may be shown, though due execution and genuineness of the notes sued on be not denied.—Bradley v. Bush, Cal., 104 Pac. 845.

17. **Boundaries**—Limitations.—Where the boundaries of a lot were clearly marked, possession of plaintiff, through his tenants, of a part of the lot, perfected title by limitation to the well-

defined limits of the whole lot.—Washam v. Harrison, Tex., 122 S. W. 52.

18. **Brokers**—Commissions.—A broker, employed to sell property, earns his commissions when he brings to his principal a customer ready, willing, and able to buy, and it is not necessary for him to take part in making the contract of sale.—Willard v. Wright, Mass., 89 N. E. 559.

19. **Building and Loan Associations**—Estoppel.—One who was present and had the means of knowing that stock was improperly voted, but who failed to object, cannot thereafter raise the question.—In re United Towns Building & Loan Ass'n, N. J., 74 Atl. 310.

20. **Carriers of Goods**—Freight in Custodia Legis.—Gen. St. Kan. 1901, §§ 5278, 5282, place the defendant's property in custodia legis from the time of service of notice of attachment upon the garnishee, so that a railroad company ceased to hold defendant's property as a carrier after service of notice upon it in garnishment proceedings.—Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co., Mo., 122 S. W. 10.

21.——Notice of Claim.—A shipper in a shipping contract held only required to give notice of his claim for damages to the connecting carrier, to make it liable therefor.—Needham v. Boston & M. R. Co., Vt., 74 Atl. 226.

22.——Stoppage in Transitu.—The exercise of the right of stoppage in transitu by the seller vests in each party to the sale the rights he had before the goods were delivered to the carrier.—Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co., Mo., 122 S. W. 10.

23. **Carriers of Live Stock**—Rest Yards.—A carrier furnishing a rest yard for stock away from its tracks must transfer the stock and assume liability for loss in doing so.—Drake v. Great Northern Ry. Co., S. D., 123 N. W. 82.

24. **Carriers of Passengers**—Alighting Passenger.—Failure of a railroad allowing passengers to board and alight from trains at a coal chute to maintain a railing across the mouth of the chute held negligence.—Credle v. Norfolk & S. R. Co., N. C., 65 S. E. 604.

25.——Proximate Cause.—Failure to stop a street car at the corner requested held not the proximate cause of injury, where a passenger voluntarily alighted at the next corner, and then walked "a good piece" and slipped and fell.—Robertson v. West Jersey & S. R. Co., N. J., 74 Atl. 300.

26.——Stations.—A railroad held guilty of negligence in not providing sufficient light at the depot platform to enable its passengers to alight in safety.—Skow v. Green Bay & W. Ry. Co., Wis., 123 N. W. 138.

27.——When Relation Begins.—The relation of carrier and passenger begins as soon as one, intending in good faith to become a passenger, enters the carrier's premises for that purpose, and the carrier's responsibility dates from that time.—Riley v. Vallejo Ferry Co., U. S. D. C., N. D. Cal., 173 Fed. 331.

28 **Champerty and Maintenance**—Conveyance by Person in Possession.—A grantor, without right of entry, having secured possession by lawful means, her conveyance was not void for champerty.—Halsted v. Silberstein, N. Y., 89 N. E. 443.

29. **Conspiracy**—Insanity Proceedings.—If defendants learned facts justifying them as reasonably prudent men in instituting proceedings to inquire into plaintiff's sanity, they acted upon probable cause, and were not liable for conspiring to commit him to an insane asylum.—Scheunert v. Albers, Wis., 123 N. W. 155.

30. **Constitutional Law**—Delegating Legislative Power.—Acts 1895, p. 70, c. 54, amending School Law (Acts 1873, p. 41, c. 25) § 8, relating to the qualifications of county superintendent of public schools, held not unconstitutional, as delegating legislative power to the board of education.—State v. Evans, Tenn., 122 S. W. 81.

31.——Depriving Defendant of a Lawful Defense.—Act Mo. Feb. 28, 1907 (Laws 1907, p. 181) § 1, requiring railroads to block frogs, switches, etc., and depriving them of the defense of contributory negligence in actions for injuries resulting from noncompliance with the act, held not to deprive the railroad company of its property without due process of law.—St. Louis, I. M. & S. R. Co. v. McNamare, Ark., 122 S. W. 102.

32.——Impleading a Party on Day of Trial.—A judgment against one made a party in open court at the trial by amendment over objection is a violation of the guaranty of due process of law.—Hubbard v. Montross Metal Shingle Co., N. J., 74 Atl. 254.

33.——Railroad Tax Exemption.—The railroad tax exemption granted by Const. 1898, art. 230, held not to violate any of the restrictions of the enabling act of 1896 (Laws 1896, p. 85, No. 52), and that act has no application to the constitutional amendment of 1904, granting a like exemption.—Louisiana Ry. & Navigation Co. v. Madere, La., 50 So. 609.

34.——Right of Petition.—The right under Const. § 1, subsec. 6, to petition the legislature for a proper purpose includes the right to lawfully circulate a petition and procure others to sign it.—Yancey v. Commonwealth, Ky., 122 S. W. 123.

35.——Subjecting Exempt Property to Executor.—A statute authorizing execution on a judgment previously rendered, and subjecting thereto property exempt at the time of the rendition of the judgment, held not to impair any contract.—Laird v. Carton, N. Y., 89 N. E. 822.

36. **Contempt**—Act Constituting.—It is contempt at common law to scandalize a court of record by a newspaper publication in respect to its decision in a case no longer pending.—State v. Hildreth, Vt., 74 Atl. 71.

37. **Contracts**—Collateral or Independent Contracts.—In deciding whether a particular promise or agreement is collateral and independent of a principal and written contract, it must be determined whether the parties to the written contract intended to include therein all of the promises relating to the subject-matter under consideration.—Lese v. Lamprecht, N. Y., 89 N. E. 365.

38.——Restraint of Trade.—A covenant not to engage in a particular business, upon its sale, is valid, even if limited as to time and place, if it is necessary to protect the purchaser.—Marshall Engine Co. v. New Marshall Engine Co., Mass., 89 N. E. 548.

39.——Right to Terminate.—No date being fixed for the determination of a certain contract, held that it might be terminated at the pleasure of either party.—Rosenblatt v. Weinman, Pa., 74 Atl. 54.

40. **Corporations**—Authority of General Manager.—The general manger of a corporation held

authorized to bind the corporation to pay plaintiff for extra work in the construction of a sewer system for its building.—Mahoney v. Hartford Inv. Corp., Conn., 73 Atl. 766.

41.——Authority to Bind.—One not an officer of a corporation, though the principal stockholder thereof, has no authority to bind it by contract.—Collins v. Leary, N. J., 74 Atl. 42.

42.——Corporate Seal.—The presence of a seal upon an instrument is only prima facie proof that it was attached by a proper authority.—Gause v. Commonwealth Trust Co. of New York, N. Y., 89 N. E. 476.

43.——Power to Assume Another Debt.—A trading corporation held not to have the power of assuming a debt of another corporation.—Morris v. Ernest Wiener Co., 119 N. Y. Supp. 163.

44.——Residence of President.—The law does not require the president of a private corporation to reside in the parish of its domicile, nor does it forbid him administering its affairs through agents or clerks.—Semple v. Frisco Land Co., La., 50 So. 619.

45.——Right to Sue on Bond.—Corporate bonds held negotiable instruments giving the holder a right to sue, and a pledgee is not required to sell them and apply the proceeds to the debt, but may sue thereon.—Stegmaier v. Keystone Coal Co., Pa., 74 Atl. 58.

46.——Purchase of Own Stock.—A transfer by a corporation of corporate assets to a stockholder for his stock, thereby rendering it insolvent, held void as to subsequent creditors.—Atlanta & Walworth Butter & Cheese Ass'n v. Smith, Wis., 123 N. W. 106.

47. **Courts**—Jurisdiction.—Under Acts 1907, p. 233, c. 82, § 7, the supreme court held not to have jurisdiction of a suit to establish certain rights in a homestead, as a homestead cannot exceed $1,000 in value.—Bell v. Noe, Tenn., 122 S. W. 81.

48.——Must Speak Through Records.—The fiscal court, like other courts, must speak through its records, and extraneous evidence is not admissible to show the meaning of its orders.—Milliken v. George L. Gillum & Son, Ky., 122 S. W. 151.

49.——Stare Decisis.—Where a supreme court is composed of seven judges because of the disqualification of one, a decision by a majority of the seven is effective as stare decisis.—Dolph v. Norton, Mich., 123 N. W. 13.

50. **Covenants**—Breach.—A covenant of warranty is not considered a debt until broken.—McKillop v. Post, Vt., 74 Atl. 78.

51. **Criminal Evidence**—Dying Declarations.—It is not necessary that the preliminary foundation for a dying declaration should be proved by express utterances of decedent, but it may be gathered from all the circumstances.—Copeland v. State, Fla., 50 So. 621.

52.——Experts.—One may be qualified by study without practice, or by practice without study, to give an opinion on a medical question.—Copeland v. State, Fla., 50 So. 621.

53.——Showing Ill Will.—In a prosecution for homicide, defendant's mistress held properly asked by the people whether defendant had ever caused decedent's arrest, to show defendant's ill will toward deceased.—People v. Bowser, N. Y., 89 N. E. 818.

54. **Criminal Law**—Accessory After the Fact.—One assisting in secreting decedent's body after death is not a principal, but is liable only as an accessory after the fact.—People v. Farmer, N. Y., 89 N. E. 462.

55. **Criminal Trial**—Custody Pending Appeal.—It is essential that accused be in custody pending his appeal by being confined, or, constructively, by being admitted to bail.—Tyler v. State, Okla., 104 Pac. 919.

56.——Record Destroyed.—Where the record necessary for a review is lost or destroyed, without possibility of substitution, a new trial will be granted.—Bailey v. United States, Okla., 104 Pac. 917.

57. **Damages**—Injury to Wife.—Where a married woman is a housekeeper, it is not necessary to prove her earning power to entitle her to recover damages for permanent injuries.—City of Louisville v. Tompkins, Ky., 122 S. W. 174.

58.——Profits.—Where a buyer of coal claimed damages for the seller's default in delivery, an instruction, authorizing recovery of lost profits by the buyer, failing to take into account his duty to purchase the deficiency elsewhere, held properly refused.—Pittsburgh Coal Co. v. Northy, Mich., 123 N. W. 47.

59.——Proximate Cause.—In a personal injury action against a street car company, it was proper to permit the jury to determine how far subsequent injuries to plaintiff delayed his recovery.—Ducharme v. Holyoke St. Ry. Co., Mass., 89 N. E. 561.

60.——Death.—In an action for killing of a boy under age, some proof of the probable cost of maintenance during minority is indispensable, that the item should be deducted from his probable earnings.—Peters v. Bessemer & L. E. R. Co., Pa., 74 Atl. 61.

61. **Death by Wrongful Act**—Theory of Statutory Right to Sue.—Rev. St. Mo. 1899, § 2865 (Ann. St. 1906, p. 1644), giving a right of action for wrongful death, held not to create a new cause of action, but to simply transmit one theretofore existing and which would otherwise have abated on the death of the injured party.—St. Louis, I. M. & S. R. Co. v. McNamare, Ark., 122 S. W. 102.

62. **Deeds**—Setting Aside.—That division of property made by a parent between children regarded apparently with equal affection is not equal is not sufficient ground for disturbing it.—Beadle v. Anderson, Mich., 123 N. W. 8.

63. **Descent and Distribution**—Real Estate.—Real estate purchased with the proceeds of inherited property is held by purchase.—In re Hullett's Estate, Ind., 89 N. E. 509.

64.——Widow's Inheritance.—Where all debts of an estate were paid, held proper for the court to award in kind to the widow of the decedent, who died childless, one-half of the shares of stock in a certain corporation.—In re Vernon's Estate, Pa., 74 Atl. 236.

65. **Divorce**—Compromise by Allowing of Alimony.—Where an attorney compromised a suit without authority by accepting a less amount of alimony than awarded his client, the client, upon learning thereof, must either ratify or disaffirm it, and, on disaffirming, must occupy the same position as before the compromise.—Sebastian v. Rose, Ky., 122 S. W. 120.

66. **Drains**—Order Establishing Ditch.—Under Gen. St. 1901, § 2538, held, that an order establishing a drainage ditch cannot be held

void upon collateral attack because no formal finding of its necessity has been recorded.—Bonnewell v. Lowe, Kan., 104 Pac. 853.

67. **Easements**—Intangible Right.—There is a distinction between actions to recover an intangible right and to recover possession of the land, and an action at law will not lie in the first instance.—Le Blond v. Town of Peshtigo, Wis., 123 N. W. 157.

68. **Ejectment**—Payment of Taxes as Proof of Ownership.—Proof that land was assessed for taxes in the name of one person, and the taxes paid by him, held not sufficient to establish ownership in him so as to sustain a recovery of the land against the holder of a prima facie title in possession.—Maney v. Burke, Ark., 122 S. W. 111.

69. **Embezzlement**—Treasurer of a Society.—The treasurer of a society may be a servant of the society, and as such guilty of embezzlement of its funds.—Faggard v. State, Okla., 104 Pac. 930.

70. **Eminent Domain**—Compensation.—In estimating the value of certain land taken in condemnation proceedings, held proper to consider its availability for sale as building lots.—Catlin v. Northern Coal & Iron Co., Pa., 74 Atl. 56.

71.—Improvements After Condemnation.—A house planted on property after the commencement of street opening proceedings, so that it could not be relocated on the lot, should be regarded as personal property in the assessment of damages for taking the part of the lot required for the street.—In re Briggs Ave. in City of New York, N. Y., 89 N. E. 814.

72. **Estoppel**—By Deed.—One is estopped to show that he did not own what he assigned.—Marshall Engine Co. v. New Marshall Engine Co., Mass., 89 N. E. 548.

73.——Pleading.—The doctrine of estoppel in pais, while of equitable origin, is by the modern practice generally applied in action at law, and facts constituting such an estoppel against a defendant may properly be pleaded in a complaint.—Kellogg-Mackay-Cameron Co. v. Havre Hotel Co., U. S. C. C. of App., Ninth Circuit, 173 Fed. 249.

74.——Subsequent Deed.—A subsequent deed subject to an easement created by reservation in a prior deed held not to estop complainant from denying defendant's right to exercise the easement reserved after it had become extinguished.—Percival v. Williams, Vt., 74 Atl. 321.

75. **Evidence**—Judicial Notice.—The court will take judicial notice that jurors generally view with suspicion testimony of an interested party and attach to it much less weight than would be given to the testimony of a disinterested witness.—Sluman v. Dolan, S. D., 123 N. W. 72.

76.——Other Offenses.—In a prosecution for shooting a policeman in defendant's endeavor to escape after committing a highway robbery, evidence of the robbery was admissible to show motive and intent in killing the policeman—People v. Morse, N. Y., 89 N. E. 816.

77.——Parol Evidence.—A note may be shown by parol or other extrinsic evidence not to constitute a contract because of the nonperformance of a condition concerning which the writing is silent.—Heitman v. Commercial Bank of Savannah, Ga., 65 S. E. 590.

78.——Positive and Negative.—Testimony of certain witnesses that they were not annoyed by odors from defendant's rendering plant did not overcome positive proof that complainant and others were nauseated by such odors.—Rausch v. Glazer, N. J., 74 Atl. 39.

79. **Executors and Administrators**—Sale, Authorization Of.—Where a will does not authorize the independent executrix to sell real estate, a purchaser from her has the burden of proving that at the time of the sale such conditions existed as would authorize the probate court to order a sale.—Haring v. Shelton, Tex., 122 S. W. 13.

80. **False Imprisonment**—Procuring Arrest.—While a person who procures a warrant may be liable to an action for malicious prosecution if he acts maliciously and without probable cause, he is not liable to an action for false imprisonment.—Campbell v. Hyde, Ark., 122 S. W. 99.

81. **Federal Courts**—Federal Question.—Federal jurisdiction on the theory that the action involves a federal question must appear from complainant's statement of his own cause of action.—Huff v. Union Nat. Bank of Oakland, U. S. C. C., N. D. Cal., 173 Fed. 333.

82. **Ferries**—Passenger.—A woman who fell from the gangplank of a ferry boat as she was about stepping on board, by reason of the starting of the boat, and was drowned, held to have been a passenger, and the owner of the boat held liable for her death.—Riley v. Vallejo Ferry Co., U. S. D. C., N. D. Cal., 173 Fed. 331.

83. **Fire Insurance**—Exchange of Property.—An insured having an equitable insurable interest in property at the time of loss held not to lose his right by subsequently completing negotiations previously begun for the exchange of the insured property.—Bartling v. German Mut. Ins. Co., Iowa, 123 N. W. 63.

84. **Fixtures**—Agreement.—An agreement that a building affixed to land should remain personal property may be shown by evidence of the subsequent admissions and dealings of the parties.—Searle v. Roman Catholic Bishop of Springfield, Mass., 89 N. E. 809.

85. **Fraud**—No Intention to Perform.—Under Rev. Codes, § 5072, section 5073, subd. 4, held that a party to a contract may recover damages for deceit, on proving that the adverse party entered into the contract without any intention of performing his part of it.—Kelly v. Ellis, Mont., 104 Pac. 873.

86. **Frauds, Statute Of**—Executed Oral Agreements.—If defendant transferred land certificates to plaintiff pursuant to an oral agreement between them to exchange the certificates for land, there was an executed oral contract, so that, to recover damages for breach of agreement to convey upon plaintiff's ouster by one to whom defendant had previously transferred the land, plaintiff need not show any oral warranty of title.—Ross v. Saylor, Mont., 104 Pac. 864.

87.——Part Performance.—An oral agreement to convey land is taken out of the statute of frauds by the vendee's taking possession of the land and paying the consideration.—Collins v. Leary, N. J., 74 Atl. 42.

88. **Fraudulent Conveyances**—Proceedings at Law.—Where a transaction is voidable as to creditors, and they do not need the use of equity jurisdiction, or any relief peculiar thereto, held, that they may proceed at law.—Atlanta & Walworth Butter & Cheese Ass'n v. Smith, Wis., 123 N. W. 106.

89.——Purchase in Wife's Name.—If defendant's husband furnished the purchase money of property, title of which was taken in the name of plaintiff's grantor because defendant's husband was financially embarrassed, such transaction would be a fraud upon his creditors, so that neither defendant nor her husband could rely on it to claim the property, especially as against plaintiff, a bona fide purchaser.—Belcher v. Belcher, 119 N. Y. Supp. 144.

90.——Simulations.—Acts of sale to certain of seller's heirs held, under the evidence, not to be simulations.—Byrd v. Pierce, La., 50 So. 452.

91. **Highways**—User Does Not Change Boundaries.—Where a road was traveled only upon the west side of a section line, which was the center of a road four rods wide, it would not operate to change the limits of the road as originally laid out.—Olwell v. Travis, Wis., 123 N. W. 111.

92. **Husband and Wife**—Sale to Wife.—Where a wife acquired good title to a horse by gift from her husband, one to whom she sold it held to also acquire good title notwithstanding the exception in P. S. 3040.—Walston v. Allen, Vt., 74 Atl. 225.

93.——Separate Estate.—A married woman cannot make a valid conveyance of her separate real estate by a deed to her husband, which she alone signs, seals and acknowledges, and which he accepts and puts on record.—Wicker v. Durr, Pa., 74 Atl. 64.

94. **Indictment and Information**—Sunday Violation.—In a prosecution for keeping open a barber shop on Sunday, the state was not required to either allege or prove that it was not a work of necessity or charity.—Stark v. Backus, Wis., 123 N. W. 98.

95. **Infants**—Release.—Release signed by minor shortly after the accident accepting a comparatively nominal sum in settlement of her injuries held not binding on her.—Hollinger v. York Rys. Co., Pa., 74 Atl. 344.

96. **Injunction**—Multiplicity of Suits.—Where trespasses are continuous so that numerous actions would be necessary to relieve against them, equity will interfere to prevent a multiplicity of suits; the legal remedy being inadequate.—Le Blond v. Town of Peshtigo, Wis., 123 N. W. 157.

97.——"Rogues'" Gallery Photographs.—Persons whose photographs were taken by officers of the law for purposes of identification held not entitled to maintain an injunction, without showing specifically that the pictures are to be used improperly.—Mabry v. Kettering, Ark., 122 S. W. 115.

98. **Insane Persons**—Appeal.—The nonresident sister of an incompetent held not a "person aggrieved," within St. 1898, § 4031, and entitled to appeal from an order dismissing her petition for the appointment of a guardian.—In re Carpenter, Wis., 123 N. W. 144.

99. **Insolvency**—Action on Bond.—The court in which insolvency proceedings are pending has original jurisdiction of an action on the bond given by the debtor for the release of the property.—Interstate Trust & Banking Co. v. United States Fidelity & Guaranty Co., La., 50 So. 612.

100. **Intoxicating Liquors**—Revoking License.—A conviction of permitting gambling in a barroom, in violation of Act No. 176, p. 242, of 1908, § 10, had at the same time as a conviction of selling liquor to a minor in violation of section 6, held a second conviction of violation of the act, within section 8, warranting a revocation of defendant's license.—State v. Apfel, La., 50 So. 613.

101. **Judgment**—Merger.—A mortgage note having been merged in a judgment thereon, a proceeding to foreclose the mortgage should be founded on the judgment rather than on the note.—Rossiter v. Marriman, Kan., 104 Pac. 858.

102. **Landlord and Tenant**—Right of Egress.—Under a lease of a room in a hotel, held there was no implied right to use a door from it into the rotunda.—Jemo v. Tourist Hotel Co., Wash., 104 Pac. 820.

103. **Larceny**—Allegation of Possession.—An indictment for theft must aver possession of the property stolen, and that it was taken from the possession of the owner or person holding for him, and in submitting that issue it must be substantially in the terms of the indictment.—Eubanks v. State, Tex., 122 S. W. 35.

104.——Intent.—To constitute larceny, a felonious intent to deprive the possessor of the property taken is essential, which may be inferred where the taking was accomplished by artifice or fraud, or was accompanied by acts of concealment.—Farrell v. Phillips, Wis., 123 N. W. 117.

105. **Libel and Slander**—Malice.—The presumption of malice arising from the publication of an article libelous per se does not prevent defendant from showing absence of malice to prevent recovery of exemplary damages.—Rocky Mountain News Printing Co. v. Fridborn, Colo., 104 Pac. 956.

106.——Publication.—To recover for a libelous publication, it must appear, not only that it was written of and concerning plaintiff, but also that it was so understood by some third person who read or heard the words.—Dunlap v. Sundberg, Wash., 104 Pac. 830.

107. **Mandamus**—To Inspect Books.—The remedy of a stockholder, denied permission to inspect the corporate books, held to be by mandamus, and not by mandatory injunction.—Brown v. Crystal Ice Co., Tenn., 122 S. W. 84.

108. **Master and Servant**—Degree of Care.—A master is not answerable for a failure to avoid peril that could not be foreseen by one in like circumstances by the exercise of reasonable care.—Nordstrom v. Spokane & I. E. R. Co., Wash., 104 Pac. 809.

109.——Injury to Another's Servant.—Gas company held liable in damages to a workman of a person engaged in improving a street, injured by an explosion of gas.—Diehle v. United Gas Improvement Co., Pa., 74 Atl. 349.

110.——Negligence.—A railroad company is not guilty of negligence in the construction of a switchyard, because at certain points the cars could not clear.—Peters v. Bessemer & L. E. R. Co., Pa., 74 Atl. 61.

111. **Mechanic's Liens**—Laches.—Under the direct provisions of Ballinger's Ann. Codes & St. § 5953 (Pierce's Code, § 6077), a lien claimant has three years in which to assert his lien, and there can be neither laches nor estoppel while he is within the time given by the statute.—Fairbanks-Morse Co. v. Union Bank & Trust Co., Wash., 104 Pac. 815.

112. **Mortgages**—Suing On Coupons.—A bondholder having unpaid coupons can sue thereon, though the bond limits the rights of ac-

tion to the trustee in the trust agreement under which the bonds were issued.—Mack v. American Electric Telephone Co., N. J., 74 Atl. 263.

113. **Municipal Corporations**—Assessments for Improvements.—That the assessment of benefits for property taken for a street was nearly equal to the compensation awarded or particularly excessive and unjust held immaterial, in the absence of actual fraud, or bad faith in fixing the assessment district.—Roberts v. City of Sandusky, Mich., 123 N. W. 39.

114.——Dangerous Streets.—If a traveler, in the exercise of reasonable care, does not know that a street is in a dangerous condition, he may assume that the city has done its duty to keep it reasonably safe.—Schelich v. City of Wilmington, Del., 74 Atl. 367.

115.——Income From Street Assessments.—The power of a city to grade streets, lay sewers or water pipes at the cost of abutting property held not a governmental function, but a power in its proprietary character, and the funds collected from the abutting property owners are not moneys of the city within its charter.—City of Seattle v. Stirrat, Wash., 104 Pac. 834.

116.——Liability for Street Construction.—Where a city, contracting for the construction of a local improvement at the cost of property benefitted thereby, permitted its comptroller to receive money in carrying out the work, the city must answer for his malfeasance.—City of Seattle v. Stirrat, Wash., 104 Pac. 834.

117.——Liability of Trustees.—Materialmen held entitled to recover of trustees of villages who failed to take a bond for their benefit from the contractor for a village building, as required by Comp. Laws 1897, §§ 10743-10745, notwithstanding moral obligation of village.—Michaels v. McRoy, Mich., 123 N. W. 37.

118.——Public Park a Public Utility.—Public park held a public utility within Const. art. 10, § 27, authorizing a city to become indebted in a larger amount than that specified in section 26, to purchase or construct public utilities or repair the same.—City of Ardmore v. State, Okla., 104 Pac. 973.

119. **Negligence**—Wanton Injury.—Where defendant's act resulting in an injury is willful, the defense of contributory negligence is inapplicable.—Hawks v. Slusher, Ore., 104 Pac. 883.

120. **Nuisance**—Cornice.—A purchaser of a new building, on which a cornice was maintained so as to create a nuisance on adjoining property, held not liable for injury caused by the nuisance.—Neuman v. Steuer, 119 N. Y. Supp. 168.

121. **Officers**—Extension of Term.—The holding over period of an office does not have the effect of extending the term succeeding.—State v. Hingle, La., 50 So. 616.

122. **Partnership**—Firm Accounts.—Partners could only recover money due them from one of the firm in the course of the firm business after a full settlement had been made and the amount due ascertained.—Kwapil v. Bell Tower Co., Wash., 104 Pac. 824.

123. **Patents**—Patentable Combination.—To constitute a patentable combination of old elements, they must by their joint action produce a new and useful result, or an old result in a cheaper or otherwise more advantageous way.—Gaines v. Alabama Consol. Coal & Iron Co., U. S. D. C., N. D. Ala., 173 Fed. 303.

124. **Payment**—Appropriation by Debtor.—A payment by mortgagor on account thereof cannot be withheld by the creditor for other bills owing by mortgagor.—Marsh v. Vanness, N. J., 74 Atl. 47.

125. **Perpetuities**—Beginning at End of Period.—Interest in property held not obnoxious to the rule against perpetuities, if beginning within a life in being and 21 years thereafter, though it may extend beyond.—Bender v. Bender, Pa., 74 Atl. 246.

126. **Pleading**—Contradictory Allegations.—Allegations in pleadings may be contradictory, and yet not give rise to an estoppel.—State v. Hingle, La., 50 So. 616.

127.——Real Party in Interest.—Rule that a person, holding title to a chose in action as security, must sue to enforce it as the real party in interest, held not to apply where a labor lienor transferred his claim for collection only.—Matzewitz v. Wisconsin Cent. Ry. Co., Wis., 123 N. W. 121.

128. **Quo Warranto**—At Relation of Private Citizen.—Under P. S. 1973, a private citizen held without capacity to maintain a quo warranto proceeding to compel a citizen to show by what authority he is exercising a license to sell intoxicating liquors.—Brown v. Alderman, Vt., 74 Atl. 230.

129.——Estoppel.—Relator, in quo warranto to test the right of defendant to hold over an office, held estopped by his position in his pleading to insist that the defendant should test his right to hold the office by some independent proceeding.—State v. Evans, Tenn., 122 S. W. 81.

130.——Failure to Take Oath.—In quo warranto to test defendant's right to hold over the office of superintendent of public schools, relator cannot contend that defendant was a usurper, in that he did not take an oath to support the Constitution, where it does not affirmatively appear that such oath was not taken.—State v. Evans, Tenn., 122 S. W. 81.

131.——Right to Office.—The right to the office of a director in a domestic corporation may be tried by quo warranto in the name of the state on the relation of the Attorney General.—State v. Brooks, Del., 74 Atl. 37.

132. **Rape**—Failure to Make Complaint.—On a trial for rape, the refusal to charge on the failure to make immediate complaint accompanied by subsequently treating accused in a friendly manner held erroneous.—Jackson v. State, Ark., 122 S. W. 101.

133. **Railroads**—Gates at Crossing.—That the gates at a railroad crossing are up when a traveler approaches with the fact that a train was standing, held, to give the traveler assurance of safety in driving on the track.—Rademacher v. Detroit, G. H. & M. Ry. Co., Mich., 123 N. W. 45.

134. **Release**—Improper Representations.—The fact that a physician may have unintentionally misrepresented to an injured person his true condition does not of itself prevent the avoidance of a release of liability for the injury, if such representations were untrue, were made in the interest of the company released, and would induce the injured person to sign the release.—Pattison v. Seattle, R. & S. Ry. Co., Wash., 104 Pac. 825.

135. **Railroads**—Receiver.—A mortgagee of the property of a railroad company, to which its income is also pledged by the mortgage, is not entitled to such income until it takes or demands possession of the property or secures the appointment of a receiver.—Central Trust

Co. of New York v. Mobile, J. & K. C. R. Co., U. S. C. C., S. D. Ala., 173 Fed. 330.

136.——Speed Over Crossings.—The speed of a train over a highway crossing in the open country, however great, is not negligence per se.—Phelps v. Erie R. Co., 119 N. Y. Supp. 141.

137. **Sales**—Conditional Sales—Failure to Advertise.—Failure to advertise the sale of property sold on condition, on default by the buyer, in the manner provided by Acts 1889, p. 117, c. 81, § 1, held to rescind the contract, so that, under section 4, the seller could not recover the purchase price.—J. I. Case Threshing Mach. Co. v. Watson, Tenn., 122 S. W. 86.

138.——Place of Sale.—Where a foreign corporation sued for the value of goods alleged to have been delivered in Wisconsin, and the proof showed a sale and delivery in New York, the variance was fatal.—Warner Instrument Co. v. Sweet, 119 N. Y. Supp. 166.

139.——Rescission.—The buyer of goods who has given drafts for the purchase price could rescind and cancel the contract for fraud in inducing to purchase, notwithstanding a bond indemnifying him against loss under the contract. —Johnson County Sav. Bank v. Renfro, Tex., 122 S. W. 37.

140.——Subject of Conditional Sale Destroyed by Fire.—Where a cash register is delivered under a contract of conditional sale and a note given for the price, and same is destroyed by fire, the purchaser is liable on the note.—National Cash Register Co. v. South Bay Club House Ass'n, 118 N. Y. Supp. 1044.

141. **Statutes**—Modification of Common Law Rules.—The rules of the common law are not to be changed by doubtful implication in statutes nor overturned except by clear and unambiguous language in the statute.—State v. Hildreth, Vt., 74 Atl. 71.

142. **Street Railroads**—Care Required.—The employees in charge of street cars must use reasonable care to see that the cars move at a reasonable speed, and stop, if necessary, where danger of collision is imminent.—Lenkewicz v. Wilmington City Ry. Co., Del., 74 Atl. 11.

143.——Duty Toward Passengers.—It is the duty of a street car company to stop to take on or let off passengers, the time of stoppage being such as to enable the passenger to reach a place of safety, either on the street or in the car before it is started.—Beattie v. Detroit United Ry., Mich., 122 N. W. 557.

144.——Injury to Passenger.—One boarding a street car held not, as a matter of law, guilty of negligence.—Ryan v. Pittsfield Electric St. Ry. Co., Mass., 89 N. E. 527.

145.——Negligence.—If a street car was just starting, the attempt of a woman incumbered with bundles to board it would not constitute negligence as matter of law.—Payne v. Springfield St. Ry. Co., Mass., 89 N. E. 536.

146. **Subrogation**—Persons Making Advances. —A person who had advanced money to pay the debts of an estate held not within any of the classes of persons entitled to subrogation as against the interests of remaindermen.—Brown v. Hooks, Ga., 65 S. E. 780.

147. **Taxation**—Exemptions.—Delegated power to levy a tax on all property within a district held not to extend to property coming into existence under constitutional exemption from taxation.—Louisiana Ry. & Navigation Co. v. Madere, La., 50 So. 609.

148.——Franchises.—A tax on a franchise of a gas company held not a privilege tax imposed on the right to be a corporation.—Commonwealth v. Louisville Gas Co., Ky., 122 S. W. 164.

149.——Tax Deed.—That judgment was rendered in tax foreclosure proceedings for a larger amount of interest than was due held not ground for avoiding the sale collaterally.—Timmerman v. McCallagh, Wash., 104 Pac. 212.

150. **Telegraphs and Telephones**—"Business Service."—The words "business service," in a telegraph company's franchise fixing rates, do not include service rendered to a telegraph company under a joint traffic arrangement.—East Tennessee Telephone Co. v. City of Harrodsburg, Ky., 122 S. W. 126.

151. **Torts**—Damages.—A civil action for damages by a party to a former action against a witness therein for alleged willful and false testimony resulting in plaintiff's defeat does not lie either at common law or by statute.—Godette v. Gaskill, N. C., 65 S. E. 612.

152.——Fright of Horse.—Where plaintiff's horse was frightened and ran away as the result of an altercation between plaintiff and defendant, plaintiff's omission to tie the horse held no defense to defendant's liability for resulting injuries.—Hawks v. Slusher, Ore., 104 Pac. 883.

153. **Trial**—Exceptions.—It is not proper practice to merely "except" to an instruction when given, stating reasons, as the particular objections should be stated when the instruction is given, and, if overruled, an exception should then be reserved.—Ross v. Saylor, Mont., 104 Pac. 864.

154. **Trover and Conversion**—Note Conditionally Delivered.—The maker of a note delivered on condition, may recover the note in trover from the payee where he has broken the condition.—Thompson v. Carter, Ga., 65 S. E. 599.

155. **Vendor and Purchaser**—Mistake.—To warrant the rescission by a court of equity of an executed contract for the sale of property on the ground of mutual mistake, the mistake must be material and so important that, if it had not been made, complainant would not have made the contract.—Murray v. Paquin, U. S. C. C., W. D. N. Car., 173 Fed. 319.

156.——Vendor's Performance.—A purchaser, suing at law to recover damages for default in contract of sale, must allege performance of all conditions on his part to be performed.—New York City Estates Co. v. Central Realty Co., 118 N. Y. Supp. 1054.

157. **Warehousemen**—Negotiability of Receipts. —Mere delivery of warehouse receipt, without indorsement, held to transfer title to the goods. —National Union Bank of Reading v. Shearer, Pa., 74 Atl. 351.

158. **Waters and Water Courses**—Dams.—The doctrine de minimis non curat lex held not to apply in a suit by a town to enjoin the maintenance of a dam attached to a highway bridge. —Town of Bristol v. Palmer, Vt., 74 Atl. 332.

159.——Diversion.—Water flowing in a well-defined water course cannot, except in the exercise of eminent domain, be diverted on the lands of an adjoining proprietor.—Kane v. Bowden, Neb., 123 N. W. 94.

160.——Easement in a Water Power.—An easement in a water power created by reservation which was not an easement appurtenant constituted an easement in gross in the absence of a dominant tenement, and during its existence was an interest in the land itself, assignable, descendible, and devisable.—Percival v. Williams, Vt., 74 Atl. 321.

161. **Wills**—Creation of Joint Tenancy.—A joint tenancy exists where two or more have joint ownership of property with unity of interest, title, time, and possession, and at common law a devise to two or more without limitations created a joint tenancy in absence of words or circumstances showing a contrary intention.—Gaunt v. Stevens, Ill., 89 N. E. 812.

162.——Declarations of Testator.—Oral or written declarations of a testator, made subsequent to the execution of his will, as to the meaning thereof or his object in making it, are inadmissible to contradict or vary its terms.—Sibley v. Maxwell, Mass., 89 N. E. 232.

163.——Legatee Suing on Testator's Note.—A legatee to whom the executors have assigned as part of his share a negotiable note executed to testator occupies the same position as testator in suing thereon.—O'Day v. Sanford, Mo., 122 S. W. 3.

164.——Testamentary Capacity.—Testatrix, having sufficient mental power to remember the particulars of her business affairs so as to understand their obvious relations, etc., had testamentary capacity.—In re Mullan's Will, Wis., 122 N. W. 723.

165. **Witnesses**—Re-examination.—Where prosecutrix made inconsistent statements on cross-examination, it was not an abuse of discretion for the court to permit the prosecuting attorney on re-examination to call her attention thereto and ask for an explanation.—People v. Rigby, Cal., 104 Pac. 945.